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No. 04-____

IN THE

Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under many death penalty statutes, an individual may be sentenced to death only if an "aggravating circumstance" enumerated by statute is present. More than two decades ago, this Court held in *Godfrey v. Georgia*, 446 U.S. 420 (1980), that one such aggravator — that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" — was unconstitutionally vague when applied without a narrowing construction. In the decision below, the Virginia Supreme Court affirmed a capital sentence based upon an identically worded vileness aggravator that was applied without a narrowing construction. As a consequence, the question presented here is:

> Whether the "vileness" aggravator used to sentence petitioner to death in this case was unconstitutionally vague.

PARTIES TO THE PROCEEDING

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Douglas R. Banghart, *A Quarter Century of Death: A Symposium on Capital Punishmentin Virginia Since Furman v. Georgia—Part IV: Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999) 13

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Melissa A. Ray, '*Meaningful Guidance': Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 CAP. DEF. J. 85 (2000) 13

Richard A. Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard, 64 N. C. L. REV. 941 (1986) 13

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Larry Bill Elliott respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App. 1a-40a) is reported at 593 S.E.2d 270 (Va. 2004). The trial court's order denying petitioner's motion to declare Virginia's vileness aggravator unconstitutional (App. 41a-44a) is unreported. The jury's verdict (App. 45a) is unreported, and the trial court's sentencing orders (App. 46a-53a) are unreported as well.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 5, 2004, and petitioner's timely motion for rehearing was denied on June 17, 2004. App. 54a. On August 19, 2004, this Court entered an order extending the time for petitioner to file a petition for a writ of certiorari until October 15, 2004. The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Virginia's capital sentencing statute provides in pertinent part:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that *his conduct in committing the*

> *offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim*; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. § 19.2-264.2 (emphasis added). Other constitutional and statutory provisions involved in this case are reprinted at App. 55a-60a.

STATEMENT

When a jury is asked to decide whether to impose the death penalty, the Eighth Amendment requires that its discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). In particular, the jury must be given clear and objective standards to apply, and those standards must genuinely narrow the class of individuals subject to capital punishment by drawing a principled distinction between those who are subject to such punishment and those who are not. *See, e.g.*, *Arave v. Creech*, 507 U.S. 463, 470-74 (1993); *Gregg*, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.).

To comply with these requirements, many states require that statutorily enumerated "aggravating circumstances" be found before the death penalty may be imposed. In *Godfrey v. Georgia,* 446 U.S. 420 (1980), the Court held that one such aggravator — that the defendant's conduct was "outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim" (Ga. Code § 27-2534.1(b)(7) (1978)) — was unconstitutional when applied without a narrowing construction because it was too vague to provide a jury with the guidance demanded by the Constitution.

Although this Court has repeatedly reaffirmed and extended the *Godfrey* decision over the last two decades, the Virginia courts have persistently refused to follow it. Virginia has a vileness aggravator that is worded exactly the same as Georgia's. Nevertheless, Virginia has refused to adopt a construction of that aggravator that clarifies and narrows its application. Accordingly, the decision below upheld petitioner's sentence even though the jury was given an instruction on the vileness aggravator that essentially quoted the statutory language found unconstitutionally vague in *Godfrey*. Because this decision violates the holding in *Godfrey*, and because it is now amply clear that the Virginia courts will not follow *Godfrey* unless forced to do so by this Court, this case warrants review.

1. Background. Petitioner Larry Bill Elliott served with distinction in the Army for thirty years, the first twenty on active duty and the final ten as a civilian employee. JA 2639-47.[1] His area of expertise was technical counter-surveillance, and at the end of his career he acted as program director of the service's technical surveillance countermeasures program and then as director of its technical counterintelligence school. JA 348.16, 2639-41. Petitioner's devotion to his duties and the long hours spent on his job took its toll on his personal life. As a consequence, he grew apart from his wife, JA 348.12, and by the summer of 1999 — as he approached fifty years of age — he was lonely and looking for female companionship. JA 1522. What he found was Rebecca Gragg.

Ms. Gragg is a much younger woman who has worked as both a stripper and a private escort. App. 7a. In the late 1990s, she branched out into the Internet, operating a web

[1] "JA" refers to the appendix filed by petitioner in the Virginia Supreme Court.

site that allowed users paying a fee to view pictures of her undressed and performing various acts. JA 1517-18. In addition, in the summer of 1999, she ran an advertisement on the Internet seeking a "sugar daddy." App. 7a.

Petitioner answered the advertisement and arranged a dinner with Gragg. When they met, Gragg recognized that she had "struck a gold mine." JA 1878. She told petitioner that she was not interested in a romantic or sexual relationship; instead, she wanted him to support her financially so that she could stop working as a stripper and set up a business making costumes for strippers. App. 7a.

Petitioner agreed, and over the course of the next eighteen months, he spent over $450,000 on Gragg. JA 1527, 1558-61, 2008. He brought her a car, gave her a cell phone, and let her use his credit card. JA 1525-27. He paid for her housing, including a house that she shared for a while with her second husband. JA 1525, 1611. He even paid for her children's food, clothing, sports equipment, and private school tuition. JA 1525-26.

The Custody Dispute — Petitioner was also dragged into a bitter custody dispute between Gragg and Robert Finch. Gragg and Finch had a stormy and sometimes violent relationship, fueled by Finch's alleged mistreatment of their two children. JA 1519-21. At one point, Gragg told a police officer that, if she continued living with Finch, she was going to kill either him or herself. JA 544. After they split up, Finch reportedly broke into the house where Gragg was living with another man, who drew a gun on Finch. JA 547-58. And Finch reported that Gragg had him beaten in February 1999, after he received some visitation rights to their children. JA 2631-34.

Petitioner became involved in the custody dispute in the spring of 2000, when Gragg sought to obtain evidence that Finch was again using illicit drugs to help in her custody battle. At first, using petitioner's money, Gragg hired a

private investigator to gather evidence that Finch was using illicit drugs. JA 1542. When the investigator failed to turn up anything, petitioner gave it a try himself, frequently surveilling the townhouse where Finch was living with his girlfriend, Dana Thrall. *Id.* He, too, turned up nothing.

In the summer of 2000, Gragg lost temporary custody of their two children to Finch. JA 1398-99. A hearing on permanent custody was scheduled for January 5, 2001. JA 1123. Because Finch had settled into a stable relationship with Thrall and developed a small business, JA 1157, 1162, he had a good chance of obtaining permanent custody of his children at the custody hearing. JA 1124.

The Murders — The hearing never took place because Robert Finch and Dana Thrall were murdered on January 2, 2001. When police arrived at the victims' townhouse early that morning, they found Finch lying dead at the foot of the staircase with three gunshot wounds. App. 3a. Thrall was found lying in a pool of blood in the kitchen, also with multiple gunshots wounds and a blunt force trauma to her head as well. App. 4a. She died the next day. *Id.*

The Investigation — Shortly after the murders, the police interviewed both Gragg and petitioner. App. 5a-9a. Because Gragg was driving back from Florida at the time of the murders, the police quickly focused their investigation upon petitioner, who admitted being in the vicinity of the victims' townhouse on the morning of the murders. *Id.* In light of the blood splattered on the walls and ceiling of the kitchen where Thrall was found, JA 1267, 2630, the police expected to find petitioner's fingerprints, blood, or hair at the townhouse, and blood from the victims in petitioner's truck. Indeed, in applying for a search warrant, the police represented that "during incidents of this nature there is always a transference of fluids, fibers and/or materials." JA 2630. They were, however, unable to find any evidence inside the townhouse suggesting petitioner's presence there.

App. 4a-5a. Moreover, even though they literally took petitioner's truck apart, the police found no blood from Finch or Thrall there. App. 9a.

The police did find a bit of petitioner's blood outside the townhouse on the fence in the back yard. App. 5a. However, there was no blood in the back yard itself or on the back door; none of the neighbors had heard the dog in the yard bark; and the door to the back yard was found locked on the morning of the murder, JA 1214, 1230, 1265-65, all of which suggests that the assailant did not leave through the back yard. In addition, a neighbor saw the storm door at the front of the house, which had been closed just moments before the murders, swinging back and forth shortly afterwards, indicating that the assailant left through the front door, which the police found open. JA 1226, 1231, 1256. Nevertheless, the police arrested petitioner on May 9, 2001, and charged him with the murders of Finch and Thrall. App. 9a.

Gragg's Polygraph Examinations — The following day, the police conducted a polygraph examination of Gragg. The police had previously given Gragg an examination in January. Although the results of that examination were inconclusive, the police suspected that she was not being forthcoming. App. 9a. The polygraph examination on May 10, 2001 was more definite. It showed that Gragg was lying when she denied having planned to have Finch killed. JA 673-74. The police confronted her with this result and told her that this was her final chance to cooperate. JA 2232-34. Gragg then changed her story.

In previous interviews, in addition to saying that she did not believe that petitioner had committed the murders, Gragg had told the police that a telephone call she received around 3:30 a.m. on the morning of the murders was from Finch. JA 1629-30, 2549. After being confronted with the results of her polygraph examination, Gragg told the police that the

telephone call was actually from petitioner and that their conversation had set him off in a jealous rage. According to Gragg, she had been sleeping in her car when she received the call on her cellphone. JA 2301-02. When she lost the signal, thinking that the call was from Finch, Gragg asked "Rob, can you hear me?" JA 2303. This mistake, Gragg told the police, enraged petitioner, who yelled that he was "tired of this s***" and that "he was going to take care of it." JA 2304.

Gragg also told the police that later that morning, after the murders, she received a telephone call in which petitioner told her that he was "trying to get rid of the stuff" and to "clean up this mess." JA 2308. Petitioner also supposedly said that she had nothing to worry about, that "[i]t wasn't going to come down" on her, and that her "problem was taken care of." JA 2309. Three months later, petitioner was indicted for the murders of Finch and Thrall. JA 1-4.

2. The Challenge to the Vileness Aggravator. On January 15, 2002, petitioner filed a pretrial motion challenging the constitutionality of Virginia's death penalty statute. JA 68-131. Among other things, he argued that the vileness aggravator employed by the Commonwealth "on its face and as applied in Virginia violates the federal constitution." JA 75. He further argued that this issue was "controlled by *Godfrey v. Georgia*, 446 U.S. 420 (1980), and the cases that follow *Godfrey*." *Id.* The trial court denied the motion without comment. App. 44a.

3. The First Trial. Petitioner's first trial began in July 2002. During that trial, the Commonwealth relied heavily on the testimony of Rebecca Gragg. JA 408-650. In particular, Gragg testified about her conversation with petitioner on the morning of the murders, informing the jury that the telephone call shortly before the murders set petitioner off in a jealous rage, JA 464-66, and that in telephone calls after the murder petitioner implicitly admitted to the murders by

telling her that her problem was taken care of, that he "had blood all over him," and that "the police were swarming all over the place." JA 470.

The Commonwealth also presented evidence that petitioner was seen less than one-half hour before the murders a short distance away from the victims' townhouse, that petitioner's blood was found on the fence in the back yard of the townhouse, and that petitioner had been inquiring into obtaining a silencer a week before the murders. App. 2a, 5a, 13a. The Commonwealth did not, however, attempt to explain how petitioner's blood could have gotten on the fence in the back yard when there was no other blood from petitioner at the crime scene, the back door was locked, the dog in the back yard had not barked, and the assailant appeared to have exited from the front door. *See supra* pp. 5-6. It also failed to present any physical evidence showing that petitioner was actually inside the townhouse. Nevertheless, the jury found petitioner guilty. App. 11a.

During the penalty phase, the Commonwealth sought the death penalty for the murder of Dana Thrall. Under Virginia law, an individual may be sentenced to death only if the jury finds at least one of two aggravating circumstances, vileness or future dangerousness, and then recommends imposing the death penalty. *See* Va. Code Ann. § 19.2-264.2; *Smith v. Commonwealth*, 248 S.E.2d 135, 150 (Va. 1978). The Commonwealth argued that both these circumstances were present. The jury agreed that the murder was vile, but it did not find that petitioner posed a serious threat of future violence. JA 685-86. It also recommended that petitioner be sentenced to death. *Id.* However, before this sentence was entered, the trial court learned that a juror had engaged in misconduct and declared a mistrial. App. 11a.

4. The Second Trial. At the second trial, the Commonwealth presented essentially the same evidence as in the first trial, with Gragg once again acting as its star

witness. JA 1575-82. To impeach Gragg's testimony, petitioner sought to inform the jury that Gragg did not disclose the most incriminating part of her testimony — the telephone calls on the morning of the murders — until she was confronted on May 10, 2001 with her failed polygraph examination. JA 209-11, 671-80. Although petitioner intended to use the polygraph evidence only for the limited purpose of showing Gragg's powerful motive to fabricate her story about the telephone calls, the trial court refused to allow any reference to the failed polygraph. JA 680-81.

Petitioner's ability to attack Gragg's credibility was hampered by other rulings as well. First, when a prosecution witness mentioned that Gragg had been questioned by a "polygrapher," the trial court did not permit petitioner to inform the jury that Gragg had failed that polygraph examination, thereby creating the risk that the jury would infer incorrectly that Gragg had taken and passed a polygraph examination. JA 1499-1503, 1509. Second, the trial court refused to require the Commonwealth to remedy false testimony from Rebecca Gragg that bolstered her credibility. At trial Gragg embellished her story about the telephone calls on the morning of the murders. For example, while earlier she had told the police she enraged petitioner by saying "Rob, can you hear me," *see supra* p. 7, at trial she testified that she had said "I love you, Rob." JA 1577-78. Similarly, at the first trial she added new details about the telephone calls after the murders, including that petitioner said he was covered in blood. *See supra* p. 8. When petitioner asked why she had not told the police these important facts, Gragg claimed that she had done so in a cigarette break during her May 10, 2001 interview and then memorialized that conversation in writing. JA 1663-71. Although the detective who allegedly took the statement denied its existence, JA 1675, the trial court did not require the Commonwealth to inform the jury of its witness's false

testimony. JA 1676-77. Once again the jury found petitioner guilty. JA 307-10.

In the penalty phase, the Commonwealth again sought the death penalty. Because of the verdict at the first trial, the Commonwealth was precluded from arguing future dangerousness and was therefore forced to rely solely on the vileness aggravator. JA 683-92. Accordingly, the Commonwealth argued that the murder of Dana Thrall was vile because it involved aggravated battery based upon her gunshot wounds and the blunt force trauma to her head. App. 63a-64a. Describing petitioner as a "cold calculated" killer, App. 65a, the Commonwealth also argued that petitioner had acted with a "depraved mind." App. 63a.

The trial court instructed the jury on the vileness aggravator by reading Virginia's model instruction on the aggravator, which largely quotes the language of the statute. In particular, the court told the jury that to find petitioner eligible for the death penalty, it had to find that the murder of Dana Thrall was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." App. 61a. The jury found that the murder was vile and recommended the death penalty. App. 45a. Because of the way the verdict form was drafted, the jury did not indicate whether this finding was based on depravity of mind or aggravated battery. *Id.* (finding that the murder of Thrall involved "torture; and/or depravity of mind; and/or aggravated battery"). Pursuant to this verdict, the trial court sentenced petitioner to death on May 22, 2003. App. 52a.

5. The Decision Below. Petitioner appealed to the Virginia Supreme Court, which consolidated its automatic review of his capital sentence with the rest of his appeal. App. 1a.

Although, as petitioner demonstrated, in most jurisdictions polygraph evidence is admissible for collateral purposes such as showing motive,[2] the court held that petitioner's polygraph evidence was properly excluded. App. 20a-21a. The court also rejected petitioner's argument that the Commonwealth had an obligation to remedy the false testimony of Rebecca Gragg on the ground that it was not properly raised, App. 28a-31a, and it found no error in the trial court's refusal to permit petitioner to rebut the false impression that Gragg passed a polygraph examination, that may have been created by the improper mention of the polygrapher. App. 21a-25a; *see also* App. 31a-34a (rejecting other challenges to petitioner's convictions).

Petitioner also challenged the capital sentence imposed upon him. *See* Def. Va. Sup. Ct. Br. at 36-50. He argued, among other things, that the vileness aggravator applied in this case was unconstitutionally vague under *Godfrey*. *See id.* at 36-39. The court summarily rejected this argument, noting that challenges to the vagueness of the vileness aggravator have been "previously rejected by this Court on numerous occasions." App. 37a n.10. The court also found that, even though petitioner had raised his vileness challenge in a pretrial motion and the trial court had ruled upon it, the challenge had not been properly preserved. App. 36a. The Commonwealth had suggested in a footnote that the challenge was waived because petitioner had not renewed it after the mistrial. Comm. Va. Sup. Ct. Br. at 39 n.11. Although the Commonwealth failed to cite any authority in support of this suggestion, the Virginia Supreme Court "concur[red] in the view expressed by the Commonwealth." App. 36a.

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[2] *See, e.g.*, Charles Alan Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5169 (2003).

Petitioner sought rehearing on his vagueness challenge to the aggravator. He argued that the requirement of renewing pretrial motions after a mistrial adopted by the decision below was unprecedented and that this novel procedural requirement conflicted with the Virginia statute governing the preservation of errors. *See* Va. Code Ann. § 8.01-384(A) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal."). The petition was denied without comment. App. 54a.

REASONS FOR GRANTING THE WRIT

The decision below violates the Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and conflicts with the decisions that other states with vileness aggravators have reached in light of *Godfrey*. The question whether Virginia's vileness aggravator violates *Godfrey* warrants the Court's attention because that aggravator has been used to sentence dozens of individuals to death and because it is now clear that the Virginia courts will not comply with the *Godfrey* decision until this Court intervenes.

It makes no difference that the decision below found petitioner's vagueness argument waived. This argument was clearly and reasonably raised in a pretrial motion upon which the trial court passed. The requirement that pretrial motions be renewed after the mistrial applied by the decision below is both novel and unreasonable, and it is well settled that federal review of constitutional claims cannot be precluded by such a requirement. In addition, this case is a good vehicle for considering the constitutionality of the Virginia's vileness aggravator, because it squarely presents that issue, and that issue is unlikely to be better presented in the future. Accordingly, it is now time for the Court to enforce its *Godfrey* decision in Virginia.

I. THE DECISION BELOW VIOLATES THE HOLDING OF THIS COURT IN *GODFREY*

As commentators have recognized,[3] the vileness aggravator employed in Virginia violates this Court's decision in *Godfrey*. In this case, as in others for more than two decades, the Virginia courts have imposed the death penalty based on a vileness aggravator that is identical to the one considered in *Godfrey*, without the narrowing construction that *Godfrey* held was required by the Constitution.

The defendant in *Godfrey* committed a gruesome double murder in which he shot both his estranged wife and his mother-in-law at close range with a shotgun. *See* 446 U.S. at 424-25 (plurality op.); *see also id.* at 449 (White, J., dissenting) (describing the murder scene). The prosecution sought the death penalty based upon the vileness aggravator in Georgia's capital punishment statute. Under that provision, an individual is eligible for the death penalty if he committed a murder that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 422 (plurality op.) (quoting Ga. Code § 27-2534.1(b)(7) (1978)). The prosecution argued that the depravity prong of the aggravator was satisfied, and the trial court instructed the

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[3] *See* Melissa A. Ray, *'Meaningful Guidance': Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 Cap. Def. J. 85, 89 (2000); Douglas R. Banghart, *A Quarter Century of Death: A Symposium on Capital Punishment in Virginia Since Furman v. Georgia – Part IV: Vileness: Issues and Analysis*, 12 Cap. Def. J. 77, 78-79 (1999); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N. C. L. Rev. 941, 965, 987-89 (1986); Comment, *Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law*, 15 U. Rich. L. Rev. 951, 960-66 (1981).

jury on the aggravator by quoting the language of the statute. *See id.* at 426. The jury then found the defendant's offense "outrageously or wantonly vile, horrible, and inhuman" and sentenced him to death. *Id.* On appeal, the Georgia Supreme Court affirmed. *See id.* at 426-27.

Although this Court had previously rejected a facial challenge to Georgia's vileness aggravator on the assumption that it could be applied constitutionally, *see Gregg v. Georgia*, 428 U.S. 153 (1976), it found that the aggravator was unconstitutionally vague as applied in *Godfrey*. First, the Court noted, the jury's verdict that the offense was "outrageously or wantonly vile, horrible, or inhuman" was unacceptably vague because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Godfrey*, 446 U.S. at 428-29 (plurality op.). Second, examining the facts of the case, it found that the Georgia Supreme Court had failed to apply a narrowing construction that cured this vagueness problem. *See id.* at 432-33; *see also id.* at 434 (Marshall, J., concurring in the judgment). This Court therefore concluded that the vileness aggravator was unconstitutionally vague as applied. *See id.* at 433 (plurality op.); *id.* (Marshall, J., concurring in the judgment).

In the nearly twenty-five years since this ruling, the *Godfrey* decision has been repeatedly reaffirmed and extended by this Court. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court struck down as unconstitutionally vague an Oklahoma statute that made the "especially heinous, atrocious, or cruel" nature of a murder an aggravating circumstance. Okla. Stat. tit. 21, § 701.12 (1981). It held that that "*Godfrey* controls this case" because "the language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the 'outrageously or wantonly vile, horrible, or inhuman language' that the jury returned in *Godfrey*." *Maynard*, 486 U.S. at 363-64. Following *Godfrey*, subsequent decisions of this Court have

struck down an Arizona "especially heinous, cruel or depraved" aggravator, *Richmond v. Lewis*, 506 U.S. 40, 46-47 (1992), and a Florida "especially wicked, evil, atrocious, or cruel" aggravator, *Espinosa v. Florida*, 505 U.S. 1079, 1080-82 (1992) (per curiam). *See also Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam) (striking down the narrowing construction for a Mississippi "especially heinous, atrocious, and cruel" aggravator).

The decision below violates *Godfrey*. As the Virginia Supreme Court has recognized, *see Bunch v. Commonwealth*, 304 S.E.2d 271, 283 (Va. 1983), Virginia defines vileness in exactly the same terms as the Georgia statute considered in *Godfrey*. *Compare* Va. Code Ann. § 19.2-264.2 *with* Ga. Code § 27-2534.1(b)(7) (1978) (App. 59a). In addition, the jury instruction given below was virtually identical to the instruction in *Godfrey*: as in that case, the instruction here quoted the statute, adding only that the aggravated battery had to involve more than the "minimum necessary to accomplish the act of murder." App. 61a. Finally, as in *Godfrey*, the prosecutor urged the jury to find vileness based upon the unconstitutionally vague condition that the murder involved depravity of mind. App. 63a.

It makes no difference that the Commonwealth also argued that petitioner's conduct satisfied the "aggravated battery" prong of the vileness aggravator. Whether or not that prong is sufficiently definite and clear to satisfy the Eighth Amendment, the verdict below was tainted by the vagueness of the depravity prong because the jury returned a general verdict that may have been based upon that prong alone. *See Shell*, 498 U.S. at 3-4 (Marshall, J., concurring) (finding death penalty invalid where two of the three prongs of an aggravator were constitutionally infirm); *see also Zant v. Stephens*, 462 U.S. 862, 881 (1983) (noting that a capital sentence must be vacated "if the jury was instructed that it could rely on any of two or more independent grounds, and

one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground").

In addition, the "aggravated battery" prong is itself unconstitutionally vague. The term "aggravated battery" is unconstitutionally vague on its face because, as the Virginia Supreme Court itself has recognized, "any act of murder arguably involves . . . an 'aggravated battery to the victim.'" *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978); *accord Gregg*, 428 U.S. at 201 (op. of Stewart, Powell, and Stevens, JJ.). Moreover, the jury instruction below neither clarified nor narrowed the aggravated battery prong. Rather than requiring some egregious mutilation or injury as the term *aggravated* battery suggests, the jury instruction interpreted the term to cover any battery "beyond the minimum necessary to accomplish the act of murder." App. 61a. The instruction also offered no guidance on how to determine the "minimum necessary" for a murder, much less any principled way of "distinguishing the few cases in which the [death] penalty is imposed from the many in which it is not." *Godfrey*, 446 U.S. at 427 (plurality op.) (quotation omitted). In short, far from narrowing and clarifying the meaning of the aggravated battery prong in a principled fashion as the Eighth Amendment demands, the jury instruction in this case broadened it and made it even more ambiguous and confusing. Thus, even if the jury had relied on the battery prong of the vileness aggravator, the decision below would still violate *Godfrey*.[4]

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[4] The Commonwealth has argued elsewhere that its vileness aggravator is irrelevant for constitutional purposes because, unlike Georgia, Virginia's death-penalty statute has a restrictive definition of capital murder that narrows the class of individuals eligible for capital punishment. This argument is without merit. The Eighth Amendment requires *both* that the class of persons eligible for the death penalty be narrowed *and* that the jury's discretion be channeled through clear and definite standards. *See*

II. THE NARROWING CONSTRUCTIONS ADOPTED BY OTHER STATES WITH VILENESS AGGRAVATORS CONFIRM THAT THE DECISION BELOW VIOLATES *GODFREY*

Virginia is not the only state to use a vileness aggravator. Four other states — Delaware, Georgia, New Jersey, and South Dakota — have vileness aggravators that are either identical or nearly identical to Virginia's. *See* App. 57a-60a. One of these states, Delaware, does not appear to have ever applied the depravity or battery prongs of its vileness aggravator. The other three states have adopted narrowing constructions of these prongs to avoid unconstitutionality, thereby confirming that Virginia is violating *Godfrey* by applying its vileness aggravator without a similar narrowing construction.

For example, New Jersey uses a vileness aggravator that is virtually identical to Virginia's. New Jersey's aggravator applies to any murder that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim." N.J. Stat. Ann. § 2C:11-3c(4)(c); *see also State v. Ramseur*, 524 A.2d 188, 229 n.33 (N.J. 1987) (noting "aggravated assault" has the same meaning as "aggravated battery"). Citing *Godfrey*, the New Jersey Supreme Court has recognized that this provision "will not pass constitutional muster unless a narrowing construction is supplied." *Ramseur*, 524 A.2d at 200-01. Accordingly, it has construed the depravity prong of the New Jersey vileness aggravator to cover only murders

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Tuilaepa v. California, 512 U.S. 967, 971-73 (1994); *see also Walton v. Arizona*, 497 U.S. 639, 665 n.* (1990) (Scalia, J., concurring in part and concurring in the judgment) (observing that, "no matter how narrowly the crime is defined," the aggravating factors must "be specified *whenever* the sentencer is given discretion" to impose the death penalty).

that were not the "product of greed, envy, revenge, or another of those emotions ordinarily associated with murder, and served no purpose for the defendant beyond his pleasure of killing." *Id.* at 231. In addition, it has construed the torture and battery prongs of the aggravator to apply only where "the defendant intended to cause, and did in fact cause, severe physical or psychological pain or suffering to the victim prior to the victim's death." *Id.*

The South Dakota Supreme Court has adopted a similar narrowing construction. Like New Jersey, South Dakota has a vileness aggravator that is virtually identical to Virginia's. *See* S.D. Codified Laws § 23A-27A-1 ("The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age."). Citing *Godfrey*, the South Dakota Supreme Court has recognized that the language of this provision, "by itself, is vague and overbroad." *State v. Rhines*, 548 N.W.2d 415, 448 (S.D. 1996); *accord State v. Moeller*, 548 N.W.2d 465, 491 (S.D. 1996). It has, however, approved a narrowing construction of the battery prong, which requires a "specific intention, design or purpose of maliciously inflicting unnecessary pain" and "infliction of serious physical abuse upon the victim by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." *Moeller*, 548 N.W.2d at 490; *see also State v. Moeller*, 616 N.W.2d 424, 452 (S.D. 2000) (approving a narrowing construction of the depravity prong which required, among other things, that the defendant "relished or gained a sense of pleasure from the murder" or committed torture or aggravated battery "as a result of an utterly corrupt, perverted or immoral state of mind").

The Georgia Supreme Court has also adopted a narrowing construction for its vileness aggravator. Prior to *Godfrey*,

that court determined that the depravity prong of its aggravator "comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." *Godfrey*, 446 U.S. at 431 (discussing *Harris v. State*, 230 S.E.2d 1, 10 (Ga. 1976), and *Blake v. State*, 236 S.E.2d 637 (Ga. 1977)). In addition, after *Godfrey*, the Georgia Supreme Court construed the battery prong to apply only where a battery is "a separate and distinct act from the act causing death," *Davis v. State*, 340 S.E.2d 862, 868 (Ga. 1986), and the defendant "maliciously causes bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." *West v. State*, 313 S.E.2d 67, 71 (Ga. 1984).

The Virginia Supreme Court has taken a very different approach. Far from adopting a narrowing construction, it has held that its vileness aggravator is clear and definite on its face. *See, e.g., Smith*, 248 S.E.2d at 149. Indeed, it has refused to adopt a controlling definition of the aggravator or to require that the terms of the aggravator be explained to the jury. *See, e.g.*, App. 34a n.9; *Clark v. Commonwealth*, 257 S.E.2d 784, 790 (Va. 1979). Its interpretation of the aggravator is also far broader and vaguer than the interpretation of the courts in other states. *See Smith*, 245 S.E.2d at 149 (defining depravity to mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation"); *id.* (defining aggravated battery to mean a battery "which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"). Thus, Virginia's application of its vileness aggravator directly conflicts with the decisions of other states with vileness aggravators, which have recognized that such aggravators cannot be applied constitutionally without a narrowing construction.

III. VIRGINIA'S VIOLATION OF *GODFREY* IS IMPORTANT AND RECURRING, AND IT WILL NOT END WITHOUT THIS COURT'S INTERVENTION

This case raises an important and recurring issue. Since the reinstatement of capital punishment in 1976, Virginia has executed more than 90 individuals, the second most of any state. *See* Deborah Fins, *Death Row U.S.A.,* Spring 2004, at 11, *available at* http://www.deathpenaltyinfo.org/DRUSA-20040401.pdf. Because vileness is one of only two aggravating circumstances used in Virginia to guide jury discretion in capital sentencing, *see Smith*, 248 S.E.2d at 472, many of these individuals have been sentenced to death based in whole or in part upon the vileness aggravator. As a consequence, it is of undeniable importance whether Virginia's use of that aggravator violates this Court's holding in *Godfrey* and is therefore unconstitutionally vague.

In addition, the Virginia Supreme Court is unlikely to comply with *Godfrey* unless this Court faces it to do so. In 1978, the Virginia Supreme Court upheld the Commonwealth's vileness aggravator against a facial challenge on the ground that the terms of the aggravator were not "so vague as to vest the sentencing authority with standardless sentencing power." *Smith,* 248 S.E.2d at 148. Although two years later *Godfrey* held just the opposite, the Virginia Supreme Court has repeatedly refused to change its interpretation of the vileness aggravator. Shortly after *Godfrey* was decided, the Virginia Supreme Court brushed the decision aside as limited to "its own peculiar facts" and refused to alter its interpretation of the vileness aggravator. *Briley v. Commonwealth*, 273 S.E.2d 57, 67 (Va. 1980); *see also Turner v. Commonwealth*, 273 S.E.2d 36, 44 (Va. 1980) ("*Godfrey* rested on its unique facts."). Even when *Maynard* and subsequent cases made it clear that *Godfrey* announced a fundamental principle extending far beyond its peculiar facts, *see supra* pp. 14-15, the Virginia Supreme Court

refused to reconsider its position. Instead, for more than twenty years, the Virginia Supreme Court has summarily dismissed vagueness challenges to the Commonwealth's vileness aggravator based upon its prior opinions.[5] Thus, the Virginia courts clearly will not comply with *Godfrey* on their own.

Nor is the Fourth Circuit likely to bring Virginia into compliance. In sharp contrast to the approach other courts have taken to similar aggravators, *see supra* pp. 17-19; *see also, e.g., Cone v. Bell*, 359 F.3d 785, 794-97 (6th Cir. 2004); *Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994), the Fourth Circuit has upheld Virginia's vileness aggravator. At first, the Fourth Circuit simply followed the Virginia Supreme Court and distinguished *Godfrey* on its facts. *See Turner v. Bass*, 753 F.2d 342, 352-53 (4th Cir. 1985). Later it upheld the aggravator on the patently inadequate ground that "a juror of ordinary sensibility would not find that all murders involve depravity of mind or an

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[5] *See, e.g., Wolfe v. Commonwealth*, 576 S.E.2d 471, 480 (Va.), *cert. denied*, 124 S. Ct. 566 (2003); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 55 (Va. 2002), *cert. denied*, 124 S. Ct. 928 (2003); *Lenz v. Commonwealth*, 544 S.E.2d 299, 303 (Va. 2001); *Cherrix v. Commonwealth*, 513 S.E.2d 642, 647 (Va. 1999); *Beck v. Commonwealth*, 484 S.E.2d 898, 907 (Va. 1997); *Williams v. Commonwealth*, 450 S.E.2d 365, 371 (Va. 1994); *Breard v. Commonwealth*, 445 S.E.2d 670, 675 (Va. 1994); *Mickens v. Commonwealth*, 442 S.E.2d 678, 684 (Va.), *rev'd on other grounds*, 513 U.S. 922 (1994); *Stewart v. Commonwealth*, 427 S.E.2d 394, 399-400 (Va. 1993); *Satcher v. Commonwealth*, 421 S.E.2d 821, 826 (Va. 1992); *Mueller v. Commonwealth*, 422 S.E.2d 380, 393 (Va. 1992); *Turner v. Commonwealth*, 364 S.E.2d 483, 488 (Va. 1988); *Tuggle v. Commonwealth*, 323 S.E.2d 539, 552 (Va. 1984); *Jones v. Commonwealth*, 323 S.E.2d 554, 564 (Va. 1984); *LeVasseur v. Commonwealth*, 304 S.E.2d 644, 660 (Va. 1983); *Clanton v. Commonwealth*, 286 S.E.2d 172, 181 (Va. 1982).

aggravated battery." *Turner v. Williams*, 35 F.3d 872, 892 (4th Cir. 1994); *accord Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir. 1992). And in recent years, it has summarily refused to reconsider its prior rulings. *See, e.g., Barnabei v. Angelone*, 214 F.3d 463, 472 (4th Cir. 2000); *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998). Thus, it is clear that Virginia will continue to violate *Godfrey* until this Court intervenes.

IV. THIS CASE IS A GOOD VEHICLE FOR CONSIDERING THE CONSTITUTIONALITY OF VIRGINIA'S VILENESS AGGRAVATOR

Although the decision below ruled that petitioner waived his vagueness challenge to Virginia's vileness aggravator by failing to renew his challenge after the mistrial, this Court is not prevented from considering that challenge because the procedural rule invoked by the decision below was both novel and unreasonable. In fact, this case is a good vehicle for considering the constitutionality of Virginia's vileness aggravator because it presents the issue in a clear and focused fashion.

1. Petitioner's vagueness challenge is properly before this Court because it was clearly and reasonably presented to the trial court. Months before trial, petitioner filed a motion raising this challenge, which the Commonwealth had the opportunity to oppose, and which the trial court ruled upon. JA 53-135. Virginia law does not require that such pretrial rulings be renewed at trial in order to be preserved for appeal. *See, e.g.*, Va. Code Ann. § 8.01-384(A) (2003); *Chawla v. Burgerbusters, Inc.*, 499 S.E.2d 829, 932-33 (1998); *King v. Commonwealth*, 570 S.E.2d 863, 866 (2002). Nevertheless, the decision below held petitioner was required to renew his challenge at the second trial because the first one ended in a mistrial. Because this renewal requirement is entirely novel and fails to serve any legitimate

state interest, it does not bar this Court from considering petitioner's vagueness claim.

Although in some circumstances a procedural default may constitute an independent and adequate state ground for rejecting a constitutional challenge, a state may not interfere with federal review of a constitutional question by interposing novel or unreasonable procedural rules. To the contrary, this Court has recognized that "only a firmly established and regularly followed state practice may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (quotation omitted). *See generally* Robert L. Stern *et al.*, *Supreme Court Practice* § 3.26(4), at 23 (8th ed. 2002). Accordingly, it is well-settled that novel procedural rules cannot bar federal review of constitutional claims that have been plainly and reasonably raised. *See, e.g.*, *Ford*, 498 U.S. at 423-25; *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Wright v. Georgia*, 373 U.S. 284, 290-91 (1963); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958). It is also well-settled that a state procedural rule cannot bar this Court from reviewing a constitutional challenge unless that rule serves a legitimate state interest. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965); *Staub v. Baxley*, 355 U.S. 313, 319-20 (1958). As Justice Holmes observed, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

The procedural rule invoked by the decision below was clearly novel. The Commonwealth offered no precedent for requiring that pretrial motions be renewed after a mistrial. To the contrary, it simply observed in a footnote that petitioner "did not make any comparable pre-trial or trial challenges to the constitutionality of Virginia's system in his

second trial," without offering any argument or authority for why petitioner's vagueness arguments were therefore waived. Comm. Va. Sup. Ct. Br. at 39 n.11. Moreover, in finding a waiver, the Virginia Supreme Court failed to cite any Virginia decision, statute, or rule. Indeed, the only authorities it cited were two federal decisions, App. 37a, neither of which holds that motions fully decided before trial must be renewed after a mistrial. *See United States v. Palmer*, 122 F.3d 215, 221 (5th Cir. 1997) (finding waiver where the court informed the defendant "that her earlier-filed motions would not be carried to the second trial"); *United States v. Oakey*, 853 F.2d 551, 554 (7th Cir. 1988) (noting that trial court explicitly carried the pretrial motions over to the second trial).

Nor could petitioner have anticipated the Virginia Supreme Court's novel renewal requirement. There is no well-settled rule requiring renewal of pretrial motions after a mistrial. To the contrary, the general rule is that "the trial court's pretrial determinations and the objections and exceptions thereto survive the mistrial, and remain effective." 75 Am. Jur. 2d *Trial* § 109, at 322 (1991) (citing *New Hampshire v. Goding*, 513 A.2d 325, 238 (N.H. 1986)); *see also Illinois v. Henderson*, 344 N.E.2d 239, 252 (Ill. App. Ct. 1976) ("[I]t is only those proceedings which have caused the mistrial that are vitiated by the mistrial."). In addition, the Virginia Code provides that "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal." Va. Code Ann. § 8.01-384(A) (2003). Because petitioner made his objection "known to the court" in his pretrial motion, it was reasonable for him to assume that his vagueness challenge would be preserved for review without renewing it at either his first or second trial. Under such circumstances, the novel requirement that pretrial motions be renewed after a mistrial is "inadequate to serve as an independent state ground" for

the decision below. *Ford*, 498 U.S. at 424; *accord NAACP*, 357 U.S. at 456-58.

The renewal requirement is also inadequate to bar review by this Court because it fails to serve any legitimate state interest. The mistrial did not alter petitioner's challenge to the vagueness of the vileness aggravator, which is legal in nature and therefore unaffected by the course of the proceedings at trial. Nor did the Virginia Supreme Court identify any legitimate interest served by its renewal requirement. There is therefore no reason to believe that renewing that challenge at the second trial would serve such an interest: as this Court has observed, "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests." *Douglas*, 380 U.S. at 422. Thus, the renewal requirement is nothing more than an "arid ritual of meaningless form," which under this Court's decisions cannot bar federal consideration of the constitutional challenge plainly and clearly presented below. *Osborne*, 495 U.S. at 124.

2. This case is a good vehicle for considering whether Virginia's vileness aggravator is unconstitutionally vague under *Godfrey*. First, unlike many cases in which both vileness and future dangerousness were found, *see, e.g.*, *Powell v. Commonwealth*, 590 S.E.2d 537, 549 (Va. 2004), *cert. denied*, – S. Ct. –, 2004 WL 2069462 (U.S. Oct. 4, 2004) (No. 04-5312); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 55 (Va. 2002); *Burns v. Commonwealth*, 541 S.E.2d 872, 896 (Va. 2001), in this case, petitioner's sentence was based upon the vileness aggravator alone. *See supra* p. 8. Second, because the jury in this case was given Virginia's model instruction on vileness, *compare* App. 61a *with Virginia Model Jury Instructions* 2-33 (2004) (Instruction Numbers P33.122 & P33.125), this case is

representative of how Virginia's vileness aggravator is applied.

Third, petitioner probably would not have been sentenced to death if a constitutionally sufficient narrowing construction had been applied. For example, if the trial court had applied New Jersey's construction of the depravity prong of the vileness aggravator and required a finding that Dana Thrall was murdered for the sheer pleasure of killing, *see supra* p. 18, the jury could not have found depravity because there was no evidence of such an intention. Similarly, if the trial court had adopted New Jersey's or South Dakota's narrowing construction of the aggravated battery prong and required an intent to inflict unnecessary pain and suffering, *see supra* p. 18, no reasonable jury could have found aggravated battery because there was no evidence of such intent either. Likewise, the battery prong could not have been satisfied under Georgia's construction of the battery prong, which requires an act separate and distinct from the conduct causing death, *see supra* p. 19, because there were no such acts here. Thus, the question whether the vileness aggravator applied here was unconstitutionally vague could not be more clearly presented.

3. It makes no difference that the decision below failed to address petitioner's vagueness challenge in detail. As noted above, *see supra* p. 21 & note 5, for the last twenty years, the Virginia Supreme Court has been summarily rejecting challenges to its vileness aggravator under *Godfrey*. Consequently, it is unlikely that the Virginia Supreme Court will offer any explanation for its refusal to follow *Godfrey*. Because it is also unlikely that any future case will pose the question presented here more clearly, the Court is unlikely to find a better vehicle for considering whether Virginia's vileness aggravator is unconstitutionally vague under *Godfrey*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[Reported at 267 Va. 396, 593 S.E.2d 270]

[SUPREME COURT OF VIRGINIA]

Present: All the Justices

LARRY BILL ELLIOTT

v. Record Nos. 031610 & 031611

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY
William D. Hamblen, Judge

OPINION BY
JUSTICE LAWRENCE L. KOONTZ, JR.
March 5, 2004

In this appeal, we review the capital murder conviction and death sentence imposed on Larry Bill Elliott for the murder of Dana L. Thrall, Code § 18.2-31(7) (willful, deliberate, and premeditated killing of more than one person as part of the same act or transaction), along with his convictions for the first degree murder of Robert A. Finch, Code § 18.2-32, and firearm offenses related to these two murders, Code § 18.2-53.1.

BACKGROUND

In accordance with well-established principles of appellate review, we will recount the evidence as reflected in the record in the light most favorable to the Commonwealth, the prevailing party below. *Wolfe v. Commonwealth,* 265 Va. 193, 198, 576 S.E.2d 471, 474, *cert. denied*, -- U.S. --, 124 S. Ct. 566 (2003).

The Murders

At approximately 4:00 a.m. on the morning of January 2, 2001, Mary Bracewell, a newspaper delivery person, was traveling her route in the Woodbridge community of Prince William County, Virginia. Bracewell was aware that there had been several recent vehicle break-ins in the neighborhood and became suspicious when she saw a man standing beside a pick-up truck parked on Belfry Lane. Bracewell observed the man, who appeared to be carrying a flashlight, walk to the north end of Belfry Lane, cross the street, walk onto a grassy area between two townhouses, and then disappear from her view. Bracewell called police on her cellular telephone to report her observations.

At 4:15 a.m., Officer Marshall T. Daniel of the Prince William County Police Department received a radio dispatch directing him to respond to Bracewell's call. He arrived at Belfry Lane three minutes later. Bracewell indicated the parked pick-up truck to Daniel and related to him what she had observed. Daniel noted that the pick-up truck, which was locked, had a Department of Defense windshield identification sticker and that there was a cellular telephone on the passenger seat.

At 4:27 a.m., Officer Daniel received a radio call to respond to a report of a domestic disturbance at a townhouse located at 3406 Jousters Way. Jousters Way is located approximately 300 yards north of Belfry Lane. Although the two streets do not intersect, one can reach Jousters Way on foot from Belfry Lane by walking in the same direction that Bracewell had seen the man beside the pick-up truck walking.

Tina Miller, who lived in an adjoining townhouse, had made the report of a domestic disturbance at 3406 Jousters Way. Miller telephoned police after being awakened by a crashing sound coming from 3406 Jousters Way at approximately 4:20 a.m. As she placed the call, Miller heard three or four "hollow" sounds followed by "the most horrible

scream" she had ever heard. Miller thought that the screaming voice sounded like that of Thrall, one of the occupants of 3406 Jousters Way.

Tommy Young, who lived in a townhouse on the opposite side of the street from 3406 Jousters Way, was walking his dog in front of his home at about the same time Miller was awakened by the crashing sound. Young heard two loud "banging noises" coming from 3406 Jousters Way, followed by the sound of a female scream and three more banging noises. Young went back to his house and told his wife to call the police. A few minutes later, Young looked out his front window and saw that the front storm door of 3406 Jousters Way, which had earlier been closed, was swaying back and forth. Young also noted that the front window shades of the home, which were normally left half-drawn, were fully closed.

Officer Scott Bigger of the Prince William County Police Department arrived at 3406 Jousters Way at 4:25 a.m. Officer Bigger knocked on the front door, but got no response. Officer Daniel arrived a few minutes later and walked around to the back of the townhouse. The backyard was enclosed by a privacy fence, and Officer Daniel could hear a large dog barking "pretty hysterical[ly], angry" inside the yard.

Returning to the front of the home, Officer Daniel observed that Officer Bigger had still received no response to his knocking on the front door. Looking through a gap between the shades of a front window, Officer Daniel was able to see the legs of a person lying prone and motionless in the foyer of the home. Officer Bigger opened the unlocked front door and he and Officer Daniel saw Finch, who lived with Thrall in the home, lying on the floor dead. Finch had suffered three gunshot wounds: one to his head, one to his back, and one to his chest.

Officer Daniel immediately returned to the back of the home to secure that area while Officer Bigger waited at the

front of the home for additional officers to arrive. When those officers arrived, Officer Daniel immediately returned to the location on Belfry Lane where the pick-up truck had been parked. He arrived at that location at 4:38 a.m. The truck was gone.

Officer Sheldon R. Creamer, one of the officers who had responded to the call by the other officers for assistance, arrived at 3406 Jousters Way at approximately 4:45 a.m. Entering the home, he heard "a muffled breathing sound" coming from the kitchen at the back of the home. In the kitchen he found Thrall, shot and lying in a pool of blood. Emergency medical personal called to the scene took Thrall by ambulance to a helicopter, which in turn evacuated her to the Washington Hospital Center in the District of Columbia, where she later died. Thrall had suffered multiple gunshot wounds including a defensive wound to her right hand, three to her head, and one to her chest. She also suffered a blunt force trauma to the back of her head consistent with a pistol-whipping.

Officer Creamer found that the backdoor was locked by its doorknob lock, but that the door's deadbolt lock was not engaged. He could hear the dog barking in the back yard. Entering the yard from the kitchen, Officer Creamer found that the dog had calmed down. He then determined that the gate of the privacy fence was secured with a locked padlock.

Meanwhile, because Officer Daniel had reported seeing a child looking out of a second floor back window, Officer Bigger reentered the home and went upstairs. There he found Thrall's two sons, aged six and four, who were crying and upset. Police officers removed the children from the home.

The Investigation

Officer Thomas Leo, a crime scene analyst with the Prince William County Police Department, collected bloodstain samples at various locations inside the townhouse. Subsequent DNA testing of these samples confirmed that the

blood was that of Thrall and Finch. Leo also found a bloodstain on the inside of the gate of the privacy fence. Subsequent DNA testing of this sample showed that it was consistent with Elliott's DNA to a degree that a match would occur "once in the entire world population."

Although a murder weapon was never recovered, forensic testing of ten bullets recovered from the home and during the autopsies of Thrall and Finch confirmed that all had been fired by the same weapon. The bullets were of a type used only in a revolver-type handgun. Gary Arnsten, a firearms expert with Virginia's Division of Forensic Science, testified at trial that because no weapon of this type could hold more than five or six bullets in its revolving chamber, he was certain that the weapon had been reloaded during the commission of the murders.

Detective Charles Hoffman of the Prince William County Police Department spoke with Finch's sister, Jennifer Finch, the day of the murders. She informed Detective Hoffman that Finch had a prior romantic relationship with Rebecca Gragg. She also told him that Finch and Gragg had been involved in a bitter custody dispute over their two children. Detective Hoffman went to Gragg's residence in Dale City, Virginia, located about six miles from the crime scene. Gragg was not at home, but there were two vehicles parked in front of the residence. One of the vehicles was registered in Elliott's name.

Gragg returned to her home later that day and was interviewed by two detectives. At that time, Gragg maintained that Elliott was her "friend and business partner." She denied knowing anything about the murders, but stated that Finch had many enemies.

The following day, January 3, 2001, Detective Hoffman and another detective traveled to Fort Meade in Hanover, Maryland, where Elliott worked as a civilian employee for the United States Army as a counterintelligence expert. The detectives had learned that Elliott owned a pick-up truck and

wanted "to determine whether that truck could, in fact, have been the truck that was seen nearby the [crime] scene." The detectives located the truck in a parking lot at Fort Meade, and Detective Hoffman observed that there was a flashlight, a cellular telephone, and a box of bandages on the seat of the truck.

As Detective Hoffman was taking photographs of the truck, Elliott approached him, identified himself as the owner of the truck, and agreed to talk to the detectives. During that conversation, Elliott told the detectives that Gragg was an employee at a brewing company he owned in West Virginia. He admitted that he had supplied Gragg with a credit card in the name of "Rebecca L. Elliott," but maintained that this had been for business purposes. He also told the detectives that he had been traveling over the New Year's holiday, as had Gragg, and that during that time he had spoken with her several times on his cellular telephone in an effort to arrange a business meeting with her.

Elliott told the detectives that he was aware that Gragg and Finch were involved in a dispute regarding the custody of their two children. Elliott related that Gragg had traveled to Florida over the New Year's holiday and had taken the children with her. He further related that Gragg had told him that she was having car trouble and would not be able to return to Virginia with the children in time to return them to Finch at 2:00 p.m. on New Year's Day as she was required to do under a visitation agreement. Elliott claimed that he had driven to Gragg's residence in the early afternoon of New Year's Day "in case Robert Finch showed up so that [Elliott] could explain to him the problems Rebecca was having with getting back." Elliott denied he had any relationship with Gragg other than as her employer. He also denied knowing Finch and claimed that he had seen him only once.

Although Detective Hoffman told Elliott that his truck had been seen in Finch's neighborhood in the early morning

hours of the day of the murders, Elliott denied having been in the area. Elliott claimed that he had spent the night of January first to second sleeping in his truck at a rest area in Maryland.

Elliott voluntarily accompanied the detectives to the Anne Arundel County, Maryland Police Department. During the course of an interview there, Elliott admitted the true nature of his involvement with Gragg. He told the detectives that he had initiated a relationship with Gragg in mid-1999 after viewing her photograph on an Internet website called "Adult Friend Finders." In her advertisement, Gragg had indicated that she was looking for a "sugar daddy." During their first meeting, Gragg told Elliott that she had worked as a stripper and "private escort," a euphemism for a "call-girl" prostitute. Gragg told Elliott that she wanted to turn her life around and needed financial support to start a business designing and selling costumes for strippers. She told Elliott that she was not interested in having a romantic or sexual relationship with him. Elliott agreed to this arrangement, saying that he wanted only friendship from Gragg.

Elliott subsequently provided Gragg with significant financial support, including paying private school tuition for her children, paying the mortgage on one house Gragg owned in West Virginia and rental on others where she lived with her husband and children at various times, providing her with cars, and permitting her to use his credit cards. Elliott also paid for breast augmentation surgery for Gragg, who had begun operating a pay-to-view pornographic website. Elliott admitted that his support of Gragg had placed a significant financial burden on him and that he had to sell investments to pay her credit card debts.

Elliott further admitted that he knew where Finch lived and that, after he had gone to Gragg's house on the afternoon of January 1, 2001, he had driven to Finch's house. He denied getting out of his truck, however, and claimed that he had seen "a black man with a slinky walk going to the front

door of the home." Elliott maintained that he had then driven to a large national retail store and a restaurant before driving to the rest stop in Maryland where he had spent the night. He then claimed that he had driven back to Gragg's residence about 3:00 a.m. on the morning of January 2, 2001, to retrieve a case of motor oil that he had seen there the day before. He then went to a convenience store where he called Gragg's cellular telephone on a pay telephone. Elliott claimed that he used the pay telephone because his own cellular telephone's battery had run down. Telephone company records showed that a call had been placed from the pay telephone to Gragg's cellular telephone at 3:28 a.m. on January 2, 2001.

Elliott admitted that after calling Gragg, he drove to Finch's neighborhood. He admitted leaving his truck, claiming that he did so only because he needed to urinate. Elliott stated that after urinating by a guardrail on the side of the road, he walked by Thrall's and Finch's townhouse. He denied going onto the property and stated that he had not heard gunshots, a scream, or anything unusual. At the conclusion of this interview, Detective Hoffman took a photograph of an abrasion he had noticed on one of Elliott's hands.

On January 4, 2001, Gragg, accompanied by her lawyer, was again interviewed by detectives investigating the murders of Thrall and Finch. During that interview, she admitted receiving a telephone call early on the morning of the murders, but claimed that the call had come from Finch. Gragg claimed that Finch had threatened to call the police if she did not return their children to him that afternoon. Gragg also told the detectives that she did not believe that Elliott had committed the murders.

On January 7, 2001, Detective Hoffman conducted another interview with Elliott during which Elliott admitted that he had been in Finch's neighborhood "hundreds of times." He further admitted walking through the

neighborhood, but again denied that he had ever been on the property of the townhouse where Thrall and Finch lived.

On January 8, 2001, Officer Leo, the crime scene analyst, took possession of Elliott's pick-up truck pursuant to a search warrant. He determined that the interior of the truck had recently been cleaned, noting that the carpet was wet and that the seats and interior had been covered with a "silicone type base cleaner." Nonetheless, testing of samples collected from the underside of the truck's floor mats showed a trace residue of blood, though the samples were too small for accurate DNA testing. A further blood sample found in the seat cushion was consistent with Elliott's DNA.

Detectives investigating the murders interviewed Gragg on January 12, 2001 and again on January 19, 2001. She continued to deny any knowledge of the murders. Based on the results of a polygraph examination that Gragg had agreed to take, police suspected that Gragg was not being fully forthcoming, but they were not certain to what extent she had knowledge of the murders or whether she may have been directly involved. Over the next several months, Gragg had continuing contact with the police concerning the investigation of the murders, but she did not provide any additional information concerning Elliott.

On May 9, 2001, Elliott was arrested in Maryland and charged with capital murder. At that time, according to Maryland State Police, Elliott was "leaving [in his vehicle] at a high rate of speed," and there was some concern that he was attempting to flee. Elliott claimed, however, that he had intended to turn himself in.

On May 10, 2001, Prince William County detectives again interviewed Gragg. During that interview, Gragg agreed to submit to a second polygraph examination. After the polygraph examiner and Detective Hoffman told Gragg that her responses to questions concerning her knowledge of the murders indicated that she was being untruthful, Gragg asked to speak with her attorney.

After consulting with her attorney, Gragg told the police that the telephone call she had received early on the morning of the murders was not from Finch, although initially she had assumed it was because the connection was not good and she could not hear the caller clearly. Gragg then related that when the caller realized that she thought she was talking to Finch, the caller said he was "tired of this s*** and was going to take care of it" and hung up. Gragg then realized that the call had come from Elliott. She attempted to call his cellular telephone, but the call was answered by a voice mail system.

Gragg told the detectives that she received several more calls on her cellular telephone from Elliott later on January 2, 2001. During one call, Elliott told her that "all of our problems had been taken care of." In another call, Elliott claimed that "Jerry," a cryptic figure Elliott supposedly knew through his work with military counterintelligence, "had come out of nowhere to help him, that he had to go clean up this mess." Later, Elliott told Gragg that he was looking for a place "to dump . . . these bloodied black trash bags from the mess that Jerry had made."

Gragg told the police that she had not been truthful in her prior interviews because she was afraid of Elliott and "Jerry," because Elliott had once told her that "Jerry" was watching her and that he would kill her or her family if she went to the police. Once Elliott was in custody and the police had assured her that there was no "Jerry," she stated that she had decided to be truthful. Gragg's attorney confirmed that she had told him on several occasions that she feared Elliott would harm her if she told the police what she knew.

Indictment and Pre-trial Proceedings

On August 6, 2001, the Prince William County grand jury returned indictments charging Elliott with the capital murder of Thrall, the first degree murder of Finch, and two counts of the use of a firearm in the commission of a felony. Elliott

was tried on these indictments initially in a jury trial in July 2002. After the jury had found Elliott guilty and sentenced him to death, the trial court declared a mistrial after it had been determined that a juror had improperly discussed the case with a third party during the trial.

Prior to the July 2002 trial, Elliott had filed numerous motions, among which were motions to have the Virginia capital murder and death penalty statutes declared unconstitutional and to have the jury instructed that, if the Commonwealth presented evidence of vileness during the penalty determination phase of the trial, the jury was to be unanimous in its determination of the elements of the act that caused it to be vile. The trial court denied these motions without comment. After the mistrial was declared, Elliott did not renew any of these motions or otherwise request that the trial court adopt the pre-trial rulings of the first trial and apply them to the conduct of the retrial.

Prior to the retrial, Elliott filed motions seeking disclosure of exculpatory and impeaching information within Rebecca Gragg's initial statement to police and related police reports. Elliott maintained that, as a result of Gragg's testimony during the first trial, he now believed that the Commonwealth was in possession of statements by Gragg or police reports contradicting her testimony. Elliott also sought an in limine ruling from the trial court to permit the introduction at trial of a videotape of Gragg's polygraph examinations. Elliott maintained that the polygraph evidence would show that Gragg had a motive to fabricate a story implicating him when she learned that police knew that she had been untruthful in her prior interviews when she denied any knowledge of or involvement in the murders.

The trial court, by letter to counsel, directed the Commonwealth to disclose to Elliott all statements, whether exculpatory or not, "authored by Rebecca Gragg and furnished to the Office of the Commonwealth's Attorney at some point during the pendency of this prosecution." The

record shows that the Commonwealth provided Elliott with additional material not previously provided under a *Brady* order entered in the first trial, including a forty-eight-page statement "generated by Ms. Gragg." The Commonwealth averred in a cover letter to the packet containing this material that Elliott had thus been "provided . . . with transcripts or summaries of all material contacts between Ms. Gragg and the police concerning this . . . case."

On February 10, 2003, and in anticipation of Elliott's second trial, a hearing was conducted on Elliott's motion to permit the videotape of Gragg's polygraph examinations into evidence. During that hearing, Elliott's counsel asserted that he should be permitted to establish that Gragg had changed her "story" after the police told her that she had "failed" the polygraph examinations. The trial court ruled that during cross-examination of Gragg, Elliott could establish that police had confronted her on May 10, 2001, with the assertion that she had been untruthful in her prior interviews and that is why she had made prior inconsistent statements to the police. The trial court reasoned that Elliott's right to cross-examination could be conducted "without getting into this morass of polygraph, no polygraph, passing, failing and the like."

Guilt Determination Phase

Elliott's second trial commenced on March 24, 2003.[1] During the guilt determination phase of the trial, the Commonwealth presented evidence in accord with the above-recited facts concerning the murders and the subsequent police investigation. During the course of the guilt determination phase, several issues arose which principally relate to the polygraph examinations of Gragg and are the subject of various assignments of error asserted

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[1] Elliott has not assigned error to any aspect of the jury selection process. Accordingly, we need not recount the incidents of that portion of the trial.

by Elliott in this appeal. For clarity, we will confine our recitation here to the facts relevant to the murders and subsequently recite additional facts where appropriate to address those assignments of error.

Brandon T. Jackson, an employee of the United States Army Intelligence & Security Command at Fort Belvoir, Virginia, had known Elliott since 1991. He testified that on December 26, 2000, Elliott had sent him an e-mail stating that Elliott and some co-workers at Fort Meade wanted to establish a gun range for practice shooting. Jackson recounted that Elliott knew that Jackson had a federal firearms dealer's license, and that Elliott wanted to know if Jackson could acquire gun silencers because these were needed for use at the gun range to avoid complaints from neighbors.

Jackson testified that he ignored the e-mail because he believed Elliott's request was "ludicrous." He explained that gun silencers would never be used for practice shooting because the repeated use of silencers made them less effective at reducing the sound of gunfire. He also testified that obtaining gun silencers legally was a complex process. Several days after sending the e-mail, Elliott telephoned Jackson and asked if he had received the e-mail. He also asked Jackson detailed questions about gun silencers and whether Jackson thought Elliott could purchase a silencer at a gun show.

Gragg testified at length concerning her relationship with Elliott. While not denying her willingness to financially exploit Elliott's attraction to her, she maintained that from the outset she had made it clear to Elliott that she was not seeking a romantic or sexual relationship. Gragg testified, however, that Elliott had once claimed to her that they had sexual intercourse while Gragg had been under the effects of a pre-operative sedative the night before her breast augmentation surgery.

Following this incident, Elliott was "constantly" professing his love to Gragg and provided her with more and more financial support and material goods. Though continuing to accept these gifts, Gragg became uncomfortable with the relationship and began refusing to see Elliott socially. Elliott then began making excuses to see Gragg allegedly on business related matters and would arrive unannounced at places where he knew Gragg would be.

Elliott had employed a private investigator to aid Gragg in her child custody dispute with Finch. When the investigator failed to provide Elliott with any useful information, Elliott told Gragg that "he knew people that could do it better." Gragg, who still had romantic feelings for Finch, told Elliott not to interfere.

Eventually, Gragg revealed to Elliott that she had resumed her relationship with Finch and was still in love with him. Elliott then told Gragg that "Jerry" was "checking up" on her so that Elliott could "keep [Gragg] in line." When Gragg made light of this claim, Elliott grabbed her by the arm and told her that she should take him seriously because "people's lives were in danger." Elliott also told her that if she went to the police, these people would be killed. Elliott specifically mentioned Finch as one of the people who would be killed.

In mid-December 2000, Elliott told Gragg that she "had gotten him into this mess," and that she had to help him get out of it. Elliott said that, if Gragg refused, he did not know what "Jerry" might do. Elliott gave Gragg personal information about his wife's financial accounts and had her pose as his wife on the telephone to make transfers out of those accounts. Elliott threw the paper with the information on it away, but Gragg retrieved it and later turned it over to the police.

On December 26, 2000, the same day that Elliott sent the e-mail to Jackson inquiring about obtaining gun silencers, Elliott sent a rambling e-mail to Gragg to "give [her] a little more information concerning a couple of issues that are in

the works." Indicating that he had sent her a carbon copy of his e-mail to Jackson, Elliott further stated that Jackson was "only one of two people that I am working this issue with." Elliott claimed that the other person, who he identified as "Mac," was "into anything that went bang and he just may have some connections." Elliott further indicated that he had to meet with "Mac" personally because "[h]e is the type of guy that would bolt if I mentioned any of this in an email."

Throughout the e-mail, as he had in previous communications to Gragg, Elliott made references to having "this one issue resolved" and the possibility of he and Gragg "hav[ing] a relationship when [her] problem [is] taken care of." Gragg testified that she understood that by the "issue" and the "problem" Elliott was referring to the child custody dispute with Finch. Elliott concluded the e-mail with a postscript telling Gragg to remember that he loved her even "if everything goes south."

After the Commonwealth rested, Elliott recalled Detective Hoffman for the limited purpose of inquiring into one of the issues, previously referenced herein, that had arisen during the Commonwealth's presentation of evidence. Elliott otherwise did not offer any evidence. After being instructed by the trial court and hearing argument from the Commonwealth and the defense, the jury retired to consider its verdicts. During deliberations, the jury sent a question to the trial court asking to view a videotape of the crime scene that had been admitted into evidence. With the concurrence of the parties, the trial court permitted the jury to view the videotape. The record does not reflect that there was any other communication from the jury during this phase of the trial.

After four hours of deliberation, the jury returned its verdicts, convicting Elliott of the capital murder of Thrall, the first degree murder of Finch, and the two related firearm offenses. At the request of the defense, the jury was polled and each juror indicated agreement with the verdicts.

Penalty Determination Phase

Elliott has not assigned error to the conduct of the evidentiary portion of the penalty determination phase of his trial. Accordingly, we will recount the evidence presented in summary fashion. The Commonwealth called Thrall's mother, brother, and sister-in-law as witnesses to give victim impact testimony. Each recounted the effect of Thrall's murder on her family, including the effect it had on her two sons.

Elliott called his wife and six of his co-workers as character witnesses. Their testimony consisted principally of assertions of Elliott's good character, mild manner, and strong work ethic, including his twenty years enlisted service in the United States Army as a counterintelligence specialist and his subsequent civilian employment in that same capacity.

Elliott's wife testified that they had married in 1976 and that they had a daughter. Elliott also had children from a prior marriage. She admitted that Elliott had not had a close relationship with their daughter. She maintained, however, that he was not a violent person and "would not hurt anybody." On cross-examination, Elliott's wife maintained that she had been unaware of Elliott's relationship with Gragg. Mrs. Elliott also testified that she was unaware until after the murders that Elliott had dissipated about $200,000 of her separate assets during the course of his relationship with Gragg.

The trial court, having ruled that the Commonwealth could not argue Elliott's future dangerousness to society as an aggravating factor supporting the imposition of the death penalty, ruled that the case would be submitted to the jury only on the vileness aggravating factor. During consideration of the jury instructions, Elliott's counsel stated that he agreed with the proposed instruction which, in relevant part, defined the vileness aggravating factor as requiring that the murder of Thrall "was outrageously or

wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery of the victim beyond the minimum necessary to accomplish the act of murder."

Elliott did not request an instruction requiring that the jury agree unanimously on the basis for finding the murder to have been vile, as he had requested in his pre-trial motion prior to his first trial. Rather, Elliott's sole assertion at this point was that, "for the record," he objected to the jury being instructed on capital murder because the evidence would not support a finding that the murder of Finch was vile. While conceding that he had no authority other than "a new article [he had] read," Elliott's counsel contended that where the capital murder charge was premised on there having been one or more killings as part of the same transaction, the jury was required to find that all the killings were vile. The trial court overruled this objection and again asked if Elliott concurred with the instructions. Elliott's counsel replied, "Yes, other than the objection I've made."

While the jury was deliberating, it sent a question to the trial court asking clarification on where the money to pay a fine imposed on Elliott would come from and "where would the money go." With concurrence of the parties, the trial court instructed the jury that it was not to concern itself with these matters. The record does not reflect that there was any other communication from the jury during this phase of the trial.

The jury returned its verdicts, sentencing Elliott to death for the capital murder of Thrall, to life imprisonment for the first degree murder of Finch, and to a total of eight years imprisonment for the two firearm offenses. At the request of the defense, the jury was polled and each juror indicated agreement with the verdicts.

Sentencing

After the jury returned its verdict imposing the death sentence, the trial court ordered the preparation of a post-

sentence report in accord with Code § 19.2-264.5. In that report, Elliott claimed for the first time that his relationship with Gragg had in fact evolved into a sexual, though not necessarily romantic, arrangement. Elliott maintained that he had not disclosed this fact to the police at Gragg's request. Elliott continued to maintain his innocence.

Following preparation of the post-sentence report, the trial court held a sentencing hearing on May 22, 2003. During that proceeding, the trial court overruled several post-verdict motions filed by Elliott. To the extent these motions are pertinent to issues raised in this appeal, we will address their substance within the discussion of the relevant assignments of error. Addressing the trial court prior to the imposition of sentence, Elliott denied any involvement in the murders of Thrall and Finch, asserting that he was the victim of "lies that were told in [the] courtroom" and "a police department that practices Gestapo techniques." The trial court imposed sentence in accord with the jury's verdicts.

We consolidated the automatic review of Elliott's death sentence with his appeal of the capital murder conviction. Code § 17.1-313(F). Elliott's appeal of his non-capital convictions was certified from the Court of Appeals, Code § 17.1-409, consolidated with his capital murder appeal, and the consolidated appeals were given priority on our docket.[2]

DISCUSSION

Elliott raises twenty assignments of error with respect to the conduct of his trial and the imposition of the death sentence. The Commonwealth contends that many of Elliott's assignments of error either were not properly preserved in the trial court or otherwise have been procedurally defaulted. We will address Elliott's

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[2] Except to the extent that Elliott asserts that errors in the general conduct of his trial would require a reversal of all his convictions, Elliott does not directly challenge his convictions or sentences for the non-capital crimes.

assignments of error seriatim, considering the Commonwealth's assertions of waiver where relevant.

The "Reasonable Doubt" Jury Question Issue

In preparing for this appeal, Elliott's appellate counsel[3] discovered in the trial court's manuscript record a handwritten note, apparently composed by a juror, which reads:

> Can you supply a more simplistic definition of reasonable Doubt from a guilt or ~~im~~ (sic) innocence point of View?

In his first assignment of error, Elliott contends that the trial court erred in failing to inform his counsel of this jury question. Elliott asks that this Court remand the case to the trial court for an evidentiary hearing "to determine whether the jury asked the reasonable doubt question appearing in the record."

Because the existence of the "reasonable doubt" jury question was not discovered until after the trial court's jurisdiction had expired, no inquiry was made in the trial court as to whether the jury had intended for this question to reach the trial judge. The Commonwealth contends that because the alleged failure of the trial court to inform Elliott of the question was not the subject of any objection in the trial court, the issue cannot be raised for the first time on appeal. Rule 5:25. Elliott responds that "a party can[not] waive an argument before becoming aware of the error."

As we previously noted herein, there is no indication in the record that the trial court received any inquiry from the jury other than the request to view the crime scene videotape during the guilt determination phase and the question

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[3] Elliott's trial counsel had sought to withdraw from representation following the mistrial of Elliott's first trial. The trial court denied the motion to withdraw, and trial counsel represented Elliott *pro bono publico* during the second trial. Subsequently, Elliott's appellate counsel were substituted and served *pro bono publico.*

concerning the imposition of a fine during the penalty determination phase. Unlike the questions received by the trial court, the "reasonable doubt" jury question contains no response from the trial court. Beyond these facts, the matter reduces itself to one involving pure speculation, and we decline to speculate whether the jury actually intended to send the purported jury question at issue to the trial court for a response. Accordingly, we will take no further consideration of this issue in this appeal.[4]

Polygraph Evidence Issues

In his second assignment of error, Elliott asserts that the trial court erred in overruling his motion in limine to have the videotape of Gragg's polygraph examinations admitted into evidence. Elliott acknowledges that evidence of polygraph examinations is not admissible to show the correctness of the results of such examinations. Relying on *Crumpton v. Commonwealth*, 9 Va. App. 131, 384 S.E.2d 339 (1989), he contends that evidence of a polygraph examination may be admissible to explain "the motive for, or context underlying, testimony or statements given by a witness after the witness is told of the results of his polygraph examination." The Commonwealth responds that Elliott's reliance on *Crumpton* is misplaced and that the trial court's ruling in this case is in accord with our decision in *Robinson v. Commonwealth*, 231 Va. 142, 155, 341 S.E.2d 159, 167 (1986), where we held that results of a polygraph examination may not be used to impeach a witness. We agree with the Commonwealth.

In *Crumpton*, the Court of Appeals held that a criminal defendant had a right to give a full explanation of his prior inconsistent statements to the police "so long as that explanation did not also necessarily invoke the polygraph

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[4] Moreover, the relief that Elliott seeks, a remand for an evidentiary hearing in the trial court, is not one that may be afforded in a direct appeal.

examination results as proof that he had been truthful" when he testified. 9 Va. App. at 137, 384 S.E.2d at 343. The Court in *Crumpton* emphasized that its holding was based upon "the particular facts and procedural posture" in which the issue arose in that case. *Id.*, 384 S.E.2d at 342. Moreover, the Court expressly acknowledged our clear precedent, as expressed in *Robinson*, 231 Va. at 156, 341 S.E.2d at 167, that the results of polygraph examinations are not admissible whether they favor the accused or are agreed to by both the accused and the Commonwealth. *Crumpton*, 9 Va. App. at 135, 384 S.E.2d at 342.

Crumpton is inapplicable to the present case. It is evident that Elliott sought to impeach Gragg's credibility by the introduction of evidence of Gragg's polygraph examinations as reflected in the videotape of those examinations. Accordingly, our decision in *Robinson* is controlling, and we hold that the trial court did not err in denying Elliott's motion in limine to admit into evidence the videotape of Gragg's polygraph examinations.

The remaining polygraph issues raised by Elliott in this appeal arose at trial in the following context. During Elliott's counsel's cross-examination of Detective Hoffman in the guilt determination phase of the trial, the following exchange occurred:

> Q. Now there is a gentleman in your police department — and I don't necessarily want you to tell me what he does, but I want to ask you the question. There is a Mr. Meyers; you are familiar with that name?
>
> A. Yes, sir.
>
> Q. He is a person that interviewed Rebecca [Gragg] as well as you; am I right?
>
> A. I believe you're referring to the polygrapher?

Elliott's counsel immediately requested a bench conference. Counsel asserted that he had specifically framed his question so that Detective Hoffman would not identify

Meyers as a polygraph examiner. The trial court agreed and asked, "[w]hat if anything do you want to do?" Elliott's counsel asserted that Hoffman had "opened the door and I want to go in it." The trial court reflected that it was "a little dismayed by the answer [Hoffman] gave," excused the jury, and proceeded to question Hoffman.

The trial court questioned Detective Hoffman on why he had referred to Meyers as "the polygrapher." Hoffman explained that there were two officers in the police department named Meyers. He conceded upon further questioning, however, that the other officer was a patrolman who had not been involved in the investigation of the Thrall/Finch murders.

Elliott's counsel maintained that because the jurors were now aware that Gragg had taken a polygraph examination, they would naturally assume that she had passed the examination and, thus, tend to find her testimony more credible. The trial court offered to instruct the jury either that it should disregard Detective Hoffman's last answer and/or to specifically instruct the jury that the fact that a witness may have taken a polygraph examination should not lend credence to the witness's testimony. Elliott's counsel indicated that he would prefer that the jury only be instructed to disregard the answer, and that he agreed to this remedy "under protest."

Elliott's counsel then moved for a mistrial, stating that "[i]t was the responsibility on the part of the Commonwealth to inform [Detective Hoffman] not" to make reference to Gragg having taken polygraph examinations. Elliott's counsel further stated that while he did not "know why [Hoffman] did it . . . he has been a police officer long enough to know that he shouldn't be discussing polygraphs in courtrooms . . . it was intentional in that regard." The trial court denied the motion for mistrial. The trial court then instructed Detective Hoffman that he was not to mention the polygraph examinations again. When the jury returned, the

trial court instructed the jurors that they "will disregard the last answer given by this witness."

Elliott subsequently filed a post-verdict motion for a new trial, asserting that the jury would have been unable to follow the trial court's instruction and disregard Detective Hoffman's answer indicating that Meyers was a polygraph examiner. During the sentencing hearing, the trial court expressly found that Hoffman had inadvertently mentioned Meyers' role as a polygraph examiner, and that, without a more definitive assertion that Gragg had undergone polygraph examinations, it would require "an inference upon inference upon inference" for the jury to have concluded that Gragg had passed the examinations. The trial court denied the motion for a new trial, ruling "that one can assume to the extent that answer has any effect at all, that [the jury] did in fact follow the Court's instructions to" disregard the answer.

In his third assignment of error, Elliott contends that the trial court erred in not permitting him to introduce the results of Gragg's polygraph examinations to rebut the false impression that Gragg had been truthful in her statements to the police. Elliott contends that the jury would naturally have such an impression from Detective Hoffman's reference to a "polygrapher" having interviewed Gragg. Elliott asserts, as he did at trial, that Hoffman's response "opened the door" to the admission of the results of Gragg's polygraph examinations. We disagree.

The term "opening the door" is a catchphrase often used to refer to the doctrine of curative admissibility. Curative admissibility, in its broadest form, allows a party to introduce otherwise inadmissible evidence when necessary to counter the effect of improper evidence previously admitted by the other party. *See Clark v. State*, 629 A.2d 1239, 1244-45 (Md. Ct. App. 1993); s*ee also* 1 John H. Wigmore, *Wigmore on Evidence,* § 15 (Rev. ed. 1983). The specific facts of this case do not implicate the application of this doctrine. We are of opinion that the trial court properly

exercised its discretion to give a curative instruction to the jury under the circumstances rather than to permit Elliott to introduce otherwise inadmissible and unreliable evidence.

In his fourth and fifth assignments of error, Elliott contends, respectively, that the trial court erred in not granting his motion for mistrial and in not granting his motion for a new trial on the ground that the curative instruction given by the trial court was not adequate to cure the prejudice caused by Detective Hoffman's testimony.

> A trial court exercises its discretion when it determines whether it should grant a motion for mistrial. Whether improper evidence is so prejudicial as to require a mistrial is a question of fact to be resolved by the trial court in each particular case. Unless this Court can say that the trial court's resolution of that question was wrong as a matter of law, it will not disturb the trial court's decision on appeal. A judgment will not be reversed for the improper admission of evidence that a court subsequently directs a jury to disregard because juries are presumed to follow prompt, explicit, and curative instructions.

Beavers v. Commonwealth, 245 Va. 268, 280, 427 S.E.2d 411, 420, *cert. denied*, 510 U.S. 859 (1993) (citations omitted).

As the trial court noted during the sentencing hearing, the oblique reference to a "polygrapher" is not so inherently prejudicial as to require the trial court to grant a mistrial or to set aside the verdict and order a new trial. *See Epperly v. Commonwealth*, 224 Va. 214, 234, 294 S.E.2d 882, 893-94 (1982) (holding that a witness's mention of the word "polygraph" did not cause harmful error because the reference was elicited "without definition or elaboration"). We hold that in this case the giving of a prompt curative instruction to disregard the reference, which the jury is presumed to have obeyed, was sufficient to avoid any prejudice to Elliott and, thus, the trial court did not abuse its

discretion in denying the motions for a mistrial and for a new trial.

Gragg's Alleged False Testimony

During his cross-examination of Gragg, Elliott's counsel attempted to impeach Gragg by asserting that she had embellished her trial testimony with inculpatory details that had not been included in the interview she gave to police on May 10, 2001. Specifically, Elliott's counsel contended that, in contrast to her trial testimony, she had not told police that Elliott had said during one of the telephone calls after the murders that he was "covered with blood" and that the police were "swarming" around. Gragg testified that while these details were not in the transcript of her interview with the police, she had "told [Detective Hoffman] everything when we were outside" taking a cigarette break and that "when I came back inside they made me — they wrote it down." Under further questioning, Gragg was uncertain whether the police had written the statement containing these additional details for her to sign or whether she had written the statement herself.

Elliott's counsel, noting that such a statement "has not been provided to the Defense," requested that Elliott be provided a copy of this written statement. The Commonwealth's Attorney advised the trial court that he had no knowledge of the written statement's existence. As it was late in the day, the trial court called a recess and directed the Commonwealth's Attorney to make inquiries regarding the existence of the written statement.

After the Commonwealth's Attorney and Elliott's counsel jointly interviewed Detective Hoffman, the Commonwealth's Attorney advised the trial court that, according to Hoffman, "no such document was created by him or by anyone . . . he did not have [Gragg] sign anything or read over anything" on May 10, 2001. Elliott's counsel stated that he wanted "a stipulation from the government that there is no such statement." The trial court ruled that either the

Commonwealth could agree to such a stipulation or Elliott could call Hoffman "to establish that no such statement exists . . . absent the stipulation by the Commonwealth the statement does not exist, you're entitled to prove that it doesn't exist." The trial court then asked Elliott's counsel, "What else do we need to do?" Elliott's counsel replied, "Not a thing."

Elliott's counsel then asked the Commonwealth's Attorney whether he would stipulate that the statement did not exist. The Commonwealth's Attorney replied, "We don't know it doesn't exist, we don't have any evidence on it. You've just got to argue that to the jury that there is no such document." The trial court again asked, "Well, what else can we do today?" Elliott's counsel replied, "That's it, your Honor."

When the trial resumed the following morning, Elliott's counsel continued his cross-examination of Gragg. Gragg conceded that she did not mention Elliott saying he was "covered in blood" or that police were "swarming" in either the May 10, 2001 interview or in a written statement she later prepared for the police.[5]

Elliott's counsel then questioned Gragg about the written statement she alleged contained these details, asking her to describe the paper it had been written on and to clarify whether she or Detective Hoffman had written the statement. Gragg testified that she could not recall whether the statement had been written on a pad or on loose paper, but that she believed Hoffman had written the statement and she had read it and signed it. Gragg further testified that when she later asked the Commonwealth's Attorney for a copy of this statement, he told her to ask Detective Hoffman, who "told me that he could not find it."

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[5] This written statement was the one provided to Elliott during the pre-trial proceedings.

After Elliott's counsel concluded his cross-examination of Gragg, the trial court called a bench conference and asked the Commonwealth's Attorney if he had any recollection of having been asked by Gragg about the May 10, 2001 written statement or referring her to Detective Hoffman. The Commonwealth's Attorney stated that he had no such recollection.

Elliott's counsel stated that while he was "not suggesting that [the Commonwealth] did anything improper" concerning Gragg's testimony, his "concern is how do we proceed knowing there is no such statement." The trial court again opined that Elliott could call Detective Hoffman to testify that the statement did not exist. Elliott's counsel then stated that he was concerned the Commonwealth might try to rehabilitate Gragg in redirect examination. The trial court then asked whether Elliott's counsel was asserting that "the Commonwealth knows this is . . . perjury." Elliott's counsel responded he was not making that assertion. Although the Commonwealth conducted a brief redirect examination of Gragg, it did not return to the issue of the alleged May 10, 2001 written statement.

After the Commonwealth rested, Elliott recalled Detective Hoffman and asked him whether he had prepared a written statement for Gragg to sign on May 10, 2001. Hoffman testified that neither he nor any other officer prepared a statement for Gragg to sign on that day.

Elliott filed a post-verdict motion for an evidentiary hearing "to determine the factual circumstances surrounding the existence of a written statement allegedly signed by Rebecca Gragg at the behest of the police on May 10, 2001." Elliott contended that either "Gragg lied on the stand in a deliberate attempt to make her story appear more credible and consistent" or "the written statement was signed by her off the record, and the police and/or the Commonwealth lost it or suppressed it." Elliott stated that an evidentiary hearing

was necessary because "any possibility of witness perjury or police misconduct must be fully explored."

At the sentencing hearing, the trial court ruled that the matter had been "explored before this jury to the extent . . . that the Defendant saw fit to do so . . . . [T]o conduct an additional hearing at this point on the same issue . . . is not warranted." The trial court denied the motion for an evidentiary hearing in the sentencing order.

In his sixth assignment of error, Elliott contends that "[t]he trial court erred in failing to declare a mistrial based upon the presentation of false testimony by the Commonwealth's witness Rebecca Gragg that she had signed a written statement during an interview with the police on May 10, 2001." In his seventh assignment of error, Elliott contends that "[t]he trial court erred in failing to require the Commonwealth to cure the false testimony by its witness Rebecca Gragg that she had signed a written statement during an interview with the police on May 10, 2001." In briefing these assignments of error, Elliott directs the Court to two points in the trial transcript, asserting that at these points "the trial court failed to declare a mistrial, to require the Commonwealth to take steps to correct the falsehood offered by its star witness, or to otherwise remedy the introduction of this testimony."

The Commonwealth contends that the record does not show that Elliott requested a mistrial or otherwise requested the trial court to "remedy the introduction of this testimony." Accordingly, the Commonwealth asserts that Elliott may not raise these issues for the first time on appeal. Rule 5:25.

In his eighth, ninth, and tenth assignments of error, Elliott contends, respectively, that the trial court erred "in failing to find that the Commonwealth violated its obligation to disclose exculpatory evidence," in failing to grant his post-trial motion for an evidentiary hearing to inquire into the existence of Gragg's alleged written statement, and "in failing to grant a mistrial based upon the Commonwealth's

failure to disclose exculpatory evidence." The Commonwealth contends that Elliott, though purporting to relate these assignments of error to the question presented in which he argued his sixth and seventh assignments of error, failed to adequately brief these issues.

We have reviewed the trial transcript at the two points referenced by Elliott with respect to the trial court's failure to grant a mistrial or provide him with some other remedy for Gragg's alleged false testimony. In addition, we have considered the entire record of Gragg's testimony concerning the statement that she alleged she signed on May 10, 2001 and the various bench conferences related to that testimony. At no point in the record can we discern where Elliott requested that the trial court declare a mistrial, sought a directive from the trial court requiring the Commonwealth to "cure" Gragg's false testimony, or asked the trial court for any specific remedy.

At best, the record shows that Elliott's counsel asked whether the Commonwealth would stipulate that Gragg had not signed any statement on May 10, 2001. In response, the trial court opined that in the absence of such a stipulation, Elliott's recourse was to call Detective Hoffman to rebut Gragg's testimony. In each instance where the trial court offered this opinion, Elliott's counsel did not object or otherwise assert that this course of action was not adequate. Moreover, Elliott availed himself of that remedy by calling Detective Hoffman as his own witness. Thus, we agree with the Commonwealth that Elliott did not preserve for appeal in the trial court the issues raised in assignments of error six and seven.

Similarly, we can discern no argument of assignments of error eight, nine, and ten within Elliott's opening appellate brief. The failure to brief an assignment of error constitutes a waiver of the argument. *See, e.g., Burns v. Commonwealth*, 261 Va. 307, 318, 541 S.E.2d 872, 880, *cert. denied,* 534 U.S. 1043 (2001). Moreover, as with

assignments of error six and seven, there does not appear to be any point in the record were Elliott requested the trial court to rule that the Commonwealth had failed to disclose exculpatory evidence, assuming that Gragg's alleged statement could be considered exculpatory, or sought a mistrial on that ground. Thus, even if argued on brief, these assignments of error would be barred in any case by the lack of preservation in the trial court.

In his reply brief, Elliott contends that even if he is precluded from raising these issues by his failure to preserve them in the trial court, "the ends of justice would demand that this Court address [these issues] because the false testimony by a government witness strikes at the very heart of the legitimacy of the judicial system." Even if we were to assume, and indeed there is support in the record for making the contention, that Gragg fabricated her testimony concerning the May 10, 2001 written statement, the record is amply clear that the jury was aware of this possibility. Every instance in which it is possible, or even probable, that a witness has been untruthful with respect to some part of her testimony does not require the declaration of a mistrial, the striking of the witness's testimony, or some other intervention on the part of the trial court. To the contrary, one of the principal duties of a jury as factfinder is to make judgments on the credibility of the witnesses and "[a] factfinder who appreciates a heightened possibility of perjury will respond with heightened scrutiny." *Ohler v. United States*, 529 U.S. 753, 764 (2000).

Elliott thoroughly cross-examined Gragg about her claim to having signed the May 10, 2001 written statement and called Detective Hoffman to rebut that testimony.[6] The

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[6] In his post-trial motion for an evidentiary hearing, Elliott contended that he wanted to question other police detectives who might have knowledge of whether the statement existed. As the trial court indicated in denying that motion, Elliott had ample opportunity to call witnesses at trial.

record reflects that in the guilt determination phase of the trial, the question of Gragg's credibility was a central theme of Elliott's closing argument. Moreover, Elliott consistently maintained at trial that he did not ascribe any misconduct to the Commonwealth with respect to Gragg's questionable testimony. Under these circumstances, we perceive no reason to invoke the ends of justice exception in order to permit Elliott to raise here issues that were never presented to or ruled on by the trial court.

For these reasons, we hold that Elliott has waived the issues raised in assignments of error six, seven, eight, and ten by failing to preserve those issues in the trial court, and that he has waived the issue raised in assignment of error nine by failing to brief that issue in this appeal.

Exclusion of Evidence of Third Parties' Animosity Towards Finch

During the trial, Elliott sought to question Gragg about an incident in which Gragg's husband had brandished a gun at Finch. The trial court sustained the Commonwealth's objection, ruling that "unrelated acts of violence would have no bearing on the case . . . I don't see that it's relevant." In his eleventh assignment of error, Elliott contends that the trial court erred in not permitting him to introduce this evidence. Elliott contends that the evidence was relevant to show that Gragg's husband "had as much motivation as [Elliott] to murder Mr. Finch, and the evidence of his prior brandishment of a gun against Mr. Finch shows that he was capable of acting on that motivation."

"Proffered evidence that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted. We have stated that a large discretion must and should remain vested in the trial court as to the admission of this class of testimony." *Johnson v. Commonwealth*, 259 Va. 654, 681, 529 S.E.2d 769, 784, *cert. denied*, 531 U.S. 981

(2000) (citations and internal quotation marks omitted). As in *Johnson*, the evidence proffered by Elliott "bore no direct relation to the crimes charged," but tended only to show a prior history of a bad relationship between one of the victims and a third party. *Id.*, 529 S.E.2d at 785; *cf. Karnes v. Commonwealth*, 125 Va. 758, 766-67, 99 S.E. 562, 565 (1919) (holding evidence of recent death threats by third party admissible). Accordingly, we hold that the trial court did not abuse its discretion in ruling that this evidence was irrelevant and inadmissible.

Elliott also sought to question Detective Hoffman on whether he was aware of an allegation by Finch, found in an affidavit in the record of Gragg's and Finch's custody dispute, that Gragg had induced some acquaintances to assault Finch. The trial court ruled that the statement was inadmissible hearsay. In his twelfth assignment of error, Elliott contends, citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), that the trial court should not have "applied [the hearsay rule] mechanistically to defeat the ends of justice." *Id.* The Commonwealth responds that Elliott did not argue for a *Chambers* exception to the hearsay rule in the trial court and, thus, this argument is barred by Rule 5:25.

We need not consider whether Elliott's generalized objection to the trial court's exclusion of this evidence as hearsay was adequate to encompass the argument he now makes on appeal. Even if the due process argument under *Chambers* were cognizable on this appeal, unlike the direct or exculpatory proof noted by the United States Supreme Court in that case, here the evidence is too tenuous and speculative to have relevance to prove that Gragg or some other third party acting for her may have committed the murders. Accordingly, we hold that the trial court properly excluded this evidence.

Sufficiency of the Evidence

At the conclusion of the Commonwealth's presentation of evidence in the guilt determination phase of the trial, Elliott

made a motion to strike the Commonwealth's evidence "to preserve the record." However, Elliott did not offer any express argument that the Commonwealth had failed to make out a *prima facie* case for capital murder or the other crimes with which he was charged. The trial court denied the motion to strike the Commonwealth's evidence.

In a post-trial motion for "a new trial," Elliott contended that the evidence was not sufficient beyond a reasonable doubt to prove that he committed the murders.[7] Elliott contended in that motion that the Commonwealth had failed to exclude every reasonable hypothesis of his innocence. Elliott further contended that even if the evidence were sufficient to prove that Elliott committed the murders, the Commonwealth failed to prove that Finch's murder preceded Thrall's murder. Though citing no authority for the proposition, Elliott contended that a capital murder premised upon the "killing of more than one person as a part of the same act or transaction" under Code § 18.2-31(7) required proof that the victim of the capital murder was killed after some other person had been killed. Following argument at the sentencing hearing, the trial court denied this motion without comment.

In his thirteenth assignment of error, Elliott contends that the trial court erred in failing to grant his motion to strike during the guilt determination phase of the trial. In his fourteenth assignment of error, he contends that the trial court erred in failing to grant his "motion to set aside the verdicts for insufficiency of the evidence (denominated a motion for a new trial)." Elliott failed to expressly relate either of these assignments of error to a question presented and in reviewing his questions presented, we do not find any

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[7] It goes without saying that if the trial court had concurred in Elliott's contention that the evidence had not proven his guilt beyond a reasonable doubt as a matter of law, the relief to which he would have been entitled was the setting aside of the verdicts and a dismissal of the indictments with prejudice, not a new trial.

that would incorporate these issues. Moreover, we cannot discern any argument within his brief that expressly addresses these assignments of error. Accordingly, we hold that Elliott has waived these assignments of error.[8] *See Burns, supra.*

Vileness Aggravating Factor Issues

In his fifteenth assignment of error, Elliott contends that the trial court erred in overruling his motion to have Virginia's capital murder and death penalty statutes declared unconstitutional "on the ground that the 'vileness' aggravator . . . is unconstitutionally vague on its face and as applied in this case and therefore fails to provide meaningful guidance to the jury." This contention is an amalgam of three arguments raised by Elliott in the omnibus motion filed prior to his first trial challenging the constitutionality of the capital murder and death penalty statutes.

In his sixteenth assignment of error, Elliott contends that "[t]he trial court erred in failing to instruct the jury on the narrowing construction of the 'vileness' aggravator adopted by this Court."[9] Although it is not entirely clear from the

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[8] In any case, when considering challenges to the sufficiency of the evidence in a criminal trial, we will not disturb the factfinder's verdict unless it is plainly wrong or without evidence to support it. *Stockton v. Commonwealth*, 227 Va. 124, 146, 314 S.E.2d 371, 385, *cert. denied*, 469 U.S. 873 (1984). The record of Elliott's second trial is adequate to support the jury's verdicts convicting him of the murders of Thrall and Finch and the related firearm offenses.

[9] Elliott does not expressly state how the definition of the vileness aggravating factor should have been narrowed or limited in jury instructions. Presumably, Elliott is contending that the killing of Thrall lacked one or more of the elements tending to show that it involved "torture, depravity of mind or an aggravated battery to the victim." Elliott provides no authority for his assertion that this Court has "adopted" instructions to this effect, although we have permitted trial courts the discretion to provide further guidance as to the meaning of these terms. *See Jones v. Commonwealth*, 228 Va. 427, 446, 323 S.E.2d 554, 564-65 (1984), *cert. denied,* 472 U.S. 1012 (1985).

argument he makes on brief with respect to this assignment of error, it would appear that Elliott is asserting the same argument as was made in one section of the omnibus motion to have the capital murder and death penalty statutes declared unconstitutional filed prior to his first trial. In any event, we can find nothing in the record of his second trial to suggest that he sought an instruction giving a "narrowing construction" of the vileness aggravator.

In his seventeenth assignment of error, Elliott contends that "[t]he trial court erred in denying appellant's motion to instruct the jury to agree unanimously upon a single element of 'vileness.'" This argument was also raised in the omnibus motion filed prior to Elliott's first trial and in a separate motion filed prior to the first trial seeking a specific jury instruction. Elliott did not proffer an instruction to this effect during the penalty determination phase of his second trial.

The Commonwealth asserts that because Elliott did not renew the pre-trial motions from his first trial or ask that the trial court adopt its prior rulings on those motions in his second trial, he failed to preserve these issues for appeal. The Commonwealth further contends that by agreeing to the jury instruction defining the vileness aggravating factor in his second trial and not proffering any alternative instructions, he has waived his claims that the trial court should have given "narrowing construction" and "single element of vileness unanimity" instructions.

In his reply brief, Elliott asserts that he was not required to reassert his pre-trial motions from his first trial because "the rulings in the first trial automatically carry over to the second one." For the same reason, Elliott contends that he was not required to proffer his alternative instructions limiting the vileness aggravating factor or requiring a unanimous determination of the elements making the crime vile, because the trial court had ruled on these issues prior to his first trial.

The cases that Elliott relies upon for his assertion that rulings from a mistrial carry over to a subsequent retrial are

inapposite and distinguishable. In *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002), the federal Court of Appeals for the Ninth Circuit ruled that where a trial court had determined that an entrapment instruction was required in a trial that ended in a mistrial, the instruction was also required to be given in the subsequent retrial where "no additional evidence to the contrary" rebutted the prior ruling. *Id.* at 1098. Thus, *Bradley* does not stand for the proposition that all rulings of a trial court in a prior mistrial carry over to a subsequent trial but, rather, that the rationale underlying a particular ruling in the first trial had been correct and should have been applied to identical circumstances in the retrial.

In *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1328 (N.D. Ohio 1981), the trial court did observe that "a mistrial does not affect or invalidate any of the pre-trial proceedings in the case." *Id.* at 1330. However, that statement is made in an opinion addressing a motion to have the pre-trial rulings from a mistrial adopted in the retrial. Moreover, the rulings at issue were those in orders disposing of discrete claims within a complex litigation, not rulings on issues of law related to matters that would arise during the retrial. In commenting on the rationale of the *Cleveland Electric* decision, the federal Court of Appeals for the Sixth Circuit has opined that the trial court is not bound in a subsequent trial by the rulings of a prior mistrial, so much as it has the discretion to "recognize and enforce prior rulings . . . but also retains the power to reconsider previously decided issues as they arise in the context of a new trial." *United States v. Todd*, 920 F.2d 399, 404 (6th Cir. 1990).

We concur in the view expressed by the Commonwealth in the present case that when a criminal case ends in a mistrial, the rulings made by the trial court prior to or during the aborted trial do not automatically carry over to a subsequent retrial. Thus, a defendant may not rely upon objections made at an aborted trial to preserve issues for appeal following his conviction in a subsequent trial. *See,*

e.g., United States v. Palmer, 122 F.3d 215, 221 (5th Cir. 1997) ("objections made at the aborted trial have no bearing on the retrial, as the two are entirely separate affairs"). Similarly, a defendant may not assert that rulings made on pre-trial motions prior to a mistrial are binding upon the trial court in a subsequent trial unless the trial court adopts those rulings on its own motion or in addressing a motion of one or both of the parties. *See, e.g., United States v. Oakey*, 853 F.2d 551, 554 (7th Cir. 1988), *cert. denied*, 488 U.S. 1033 (1989). In the absence of a ruling in the second trial adopting the rulings of the aborted trial, the defendant is required to renew his motions with specificity in order to preserve the record of the trial court's rulings and the defendant's objections thereto for any subsequent appeal of the retrial.

Elliott does not assert that the trial court adopted its prior rulings for purposes of his second trial, and we have not been directed to any place in the record where such was done or requested. Accordingly, we hold that under these circumstances Elliott is barred from raising the issues asserted in this appeal in assignments of error fifteen, sixteen, and seventeen. Additionally, we also agree that Elliott's failure to proffer in his second trial alternative instructions limiting the definition of the vileness aggravating factor or requiring unanimity on the elements of vileness acts as a waiver of the claim that the trial court should have given such instructions to the jury.[10]

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[10] We note further that, as framed within the omnibus pretrial motion challenging the constitutionality of Virginia's capital murder and death penalty statutes, Elliott's contention that the vileness aggravating factor is vague is a reassertion of an argument previously rejected by this Court on numerous occasions. *See, e.g. Wolfe*, 265 Va. at 208, 576 S.E.2d at 480 and cases cited therein. Shortly before Elliott's first trial commenced, the United States Supreme Court released its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). In briefing his argument in this appeal that the vileness aggravating factor is unconstitutionally vague, Elliott for the first time asserts that *Ring* somehow implicates our prior consideration of this issue. Elliott's failure to argue the application of

Statutory Review

Elliott's eighteenth and nineteenth assignments of error merely restate the elements of the statutory review of any death sentence mandated by Code § 17.1-313(C). Accordingly, we will combine the mandatory review of Elliott's death sentence with our discussion of the issues raised by Elliott in his assignments of error.

Code § 17.1-313(C)(1) requires that we determine whether the jury imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Elliott makes no particularized argument that the jury's verdict was not the product of a reasoned and dispassionate deliberation. Nor does our review of the record in this case disclose that the jury failed to give fair consideration to all the evidence both in favor and in mitigation of the death sentence, or was otherwise improperly influenced in favor of imposing the death penalty. Accordingly, we hold that the sentence of death was not imposed under passion, prejudice, or any arbitrary factor.

With respect to the consideration "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Code § 17.1-313(C)(2), Elliott contends that "[t]he Commonwealth has never imposed such a sentence upon a man with as long and accomplished a record of service to his country as" Elliott. He further contends that

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Ring in the trial court, despite the fact that nine months elapsed between that opinion's release and the commencement of his second trial, not only constitutes a waiver of that issue on appeal, but demonstrates the necessity of prohibiting a defendant from attempting to rely upon rulings from a prior aborted trial. In any event, we have already addressed the claim that *Ring* affects our prior consideration of constitutional issues in death penalty cases and have determined that "nothing . . . in *Ring* suggests that the Court intended to revisit broader issues of due process protections afforded in the penalty determination phase of all capital murder trials." *Powell v. Commonwealth*, 267 Va. 107, 137, 590 S.E.2d 537, 555 (2004).

"this case lacks the characteristics that normally distinguish the cases in which the death penalty is imposed based upon multiple homicides and vileness from those in which juries choose to impose life imprisonment."

During the penalty determination phase of the trial, the jury heard testimony recounting Elliott's service as a soldier and non-commissioned officer in, and later as a civilian employee of, the United States Army. The jury also heard evidence throughout the course of the trial that Elliott betrayed his wife of twenty-three years, pursuing a former prostitute and squandering hundreds of thousands of dollars on this illicit relationship. The evidence showed that Elliott murdered two innocent people in a brutal and premeditated manner, showing no remorse for and purposefully seeking to conceal his crimes. The murder of Thrall was particularly heinous in that it appears she was a victim of opportunity, killed while her young children were nearby and simply because she was present in the home with Finch or perhaps because she saw and could have identified Elliott.

The jury could reasonably have concluded from Elliott's actions in his secret relationship with Gragg that he had renounced the values he purported to support and follow in his public life. Faced with the incongruent reality of Elliott's two lives, the jury was well within its province to determine that the mitigating value of Elliott's years of service in the armed forces did not outweigh his culpability for the death of Thrall under the circumstances of that murder.

Because of the statutory directive that we compare this case with "similar cases," we have focused on cases in which an individual was murdered as part of the same act or transaction as another killing and the death penalty was imposed upon a finding of the vileness aggravating factor. However, our proportionality review includes all capital murder cases presented to this Court for review and is not limited to selected cases. Even though no two capital murder cases are identical, we are confident that, given the

heinousness associated with the murder of Thrall, the sentence of death imposed on Elliott is neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in this Commonwealth for crimes of a similar nature considering the crime and this defendant. *See, e.g., Hudson v. Commonwealth*, 267 Va. 29, 590 S.E.2d 362 (2004); *Bailey v. Commonwealth*, 259 Va. 723, 529 S.E.2d 570, *cert. denied,* 531 U.S. 995 (2000); *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (1998), *cert. denied,* 527 U.S. 1038 (1999); *Woodfin v. Commonwealth*, 236 Va. 89, 372 S.E.2d 377 (1988), *cert. denied,* 490 U.S. 1009 (1989).

In his twentieth assignment of error, Elliott contends that "[t]he trial court erred in sentencing appellant to death." Elliott purports to relate this assignment of error to the questions presented addressing his challenges to the constitutionality of the vileness aggravating factor and the mandatory review of his death sentence. Within the sections of his brief addressing those questions presented, we can discern no particularized argument that the trial court erred in imposing the sentence of death in accord with the jury's verdict. Thus, we conclude that this assignment of error is merely an assertion of general or cumulative error in the conduct of the trial. We do not consider such generalized assertions of error.

CONCLUSION

Having found no error below and perceiving no other reason to commute or set aside the sentence of death, we will affirm the judgment of the trial court.

Affirmed.

VIRGINIA
IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA

VS.

Criminal Nos. 51115, 51116, 51117 and 51118

LARRY BILL ELLIOTT
Defendant

ORDER

THIS MATTER CAME TO BE HEARD THIS DAY upon the motion by the Court to consider any pending motions; after due notice to the parties pursuant to the previous Court order; and upon the appearance of the Commonwealth Attorney, the Defendant and Defendant's counsel; and upon argument of counsel

IT APPEARING TO THE COURT that the Court shall make the following rulings as to the motions now pending before the Court for the reasons stated in open Court and upon the record, it is therefore Ordered as follows:

1. That the Motion by the Defendant **to continue the trial date,** to which there is no objection by the Commonwealth, the Defendant having waived his right to speedy trial, shall be, and the same hereby is granted, there being no objection by the Commonwealth, and this trial date is continued to July 8,9,10,15,16,17,22,23,24,2002 at 10 am for trial by jury, and

2. That the Motion by the Defendant to **Request a Subpoena Duces Tecum to the Director of the Virginia Department of Corrections** is granted, there being no objection by the Commonwealth, and

3. That the related Motion by the Defendant **to Request a Subpoena** Duces Tecum of the Clerk of the Circuit Court is granted, there being no objection by the Commonwealth thereto, and

4. That the related Motion by the Defendant **to Request a Subpoena** Duces Tecum of Interprobe, Inc. is granted, there being no objection by the Commonwealth thereto, and

5. That the related Motion by the Defendant **to Request a Subpoena** Duces Tecum to the Commander of the Office of Public Safety Communications is granted, there being no objections by the Commonwealth thereto, and

6. That the Motion by the Defendant for **a Bill of Particulars as to the Aggravating Circumstances** is continued to February 20, 2002 at 10 am to allow the Commonwealth to file a written response, and

7. A. That the Motion by the Defendant **to submit a Questionaire** and Instructions to each prospective juror has been objected to by the Commonwealth Attorney and the same hereby is denied, and

B. That the Motion by the Defendant for **individual voir dire** of the jury panel has been objected to by the Commonwealth and for the reasons stated in open court the same hereby is denied. The Court shall proceed with voir dire by panels of three, and

C. That it further appearing to this court that the Defendant has filed a motion for leave to submit a jury questionaire but has not filed his proposed voir dire questions as ordered by this Court originally on October 30, 2001. The Defendant has also filed an objection to the voir dire questions proposed by the Commonwealth Attorney. The Court therefore orders as follows:

1. That Defendant file with the Court his proposed voir dire questions by February 8, 2002, and

2. That the Commonwealth Attorney shall file any objection it has to said proposed voir dire questions by February 15, 2002, and

3. That this cause shall be continued for a hearing on the objections to the proposed voir dire questions on at 10 am on February 20, 2002 at 10 am, and

8. The Commonwealth Attorney has filed with this Court certain proposed jury instructions and the Defendant has filed certain proposed jury instructions. The Defendant has also filed objections to the said proposed jury instructions. The Court therefore orders as follows:

1. That the commonwealth Attorney shall file any objections to defendants proposed jury instructions by February 8, 2002 ,and

2. That this cause shall be continued to 10 am on February 20, 2002 for a hearing on the objections of the Defendant and the Commonwealth Attorney to the proposed jury instructions, and

As part of his proposed jury instructions, the Commonwealth and Defendant also included a **request leave to file additional jury instructions** or modifications of the proposed instructions to accommodate incidents or evidence during the trial and other issues that may arise. That motion by the Defendant is granted, and

9. The Court will scrutinize any challenges of jurors for cause as required by the law of Virginia, otherwise, the Motion by the Defendant **to Scrutinize Strictly Challenges** of Jurors For Cause is denied, and

10. That the Motion by Defendant **to Examine Investigators Under Oath** denied, and

11. That the Motion by the Defendant **to Exclude Victim Impact Testimony** is denied, and

12. That the Motion by Defendant **to Sentence the Capital Charge before the Non-capital Felonies** is denied, and

13. The Court will properly instruct the jury in accordance with Model Jury Instruction 33.122, otherwise, the Motion by the Defendant **to Instruct the Jury to Find Beyond a Reasonable Doubt and Unanimously Agree Upon the Vileness Elements** is denied, and

14. That the Motion by the Defendant **pursuant to Virginia Code Section 19.2-264.3:2** is granted, and the Commonwealth's response shall be filed on or before June 10, 2002, and

15. The Motion by Defendant **to Declare the Virginia Capital Murder and Death Penalty Statutes Unconstitutional** is denied.

16. The Court hereby schedules additional hearings for any additional motions on April 17, 2002 and June 12, 2002 to begin at 10 am.

And this cause is continued.
Entered this 22nd day of January, 2002.

/s/
Judge Richard B. Potter

Seen:

/s/
Commonwealth Attorney

Seen:

/s/
William B. Moffitt
Counsel for the Defendant

We, the jury, on the issue joined, having found the defendant, LARRY BILL ELLIOTT, guilty of Capital Murder in that he did willfully, deliberately and premeditatedly kill more than one person as part of the same act or transaction, and having found unanimously and beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture; and/or depravity of mind; and/or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered all the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ FRED BARFIELD
FOREPERSON

FRED BARFIELD
PRINT FOREPERSON'S NAME

4/4/03
DATE

COMMONWEALTH OF VIRGINIA
vs. CR#51115
LARRY BILL ELLIOTT

VIRGINIA: IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 153

Hearing Date: May 22, 2003
Judge: William D. Hamblen

COMMONWEALTH OF VIRGINIA

v.

LARRY BILL ELLIOTT,
Defendant

SENTENCING ORDER

The cases came before the Court for sentencing of the defendant, who appeared in person with counsel, William Moffitt and Peter Paris. The Attorney for the Commonwealth was present.

On April 2, 2003, the defendant was found guilty of the following:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)		OFFENSE DATE	CODE SECTION
CR51115	CAPITAL MURDER	(F)	01/02/2001	18.2-31
CR51116	USE OR DISPLAY OF A FIREARM IN THE COMMISSION OF CAPITAL MURDER	(F)	01/02/2001	18.2-53.1
CR51117	FIRST DEGREE MURDER	(F)	01/02/2001	18.2-32

CR51118	USE OR DISPLAY OF A FIREARM IN THE COMMISSION OF FIRST DEGREE MURDER	(F)	01/02/2001	18.2-53.1

The Potomac News moved the Court to allow still photography during today's sentencing hearing. The Court denied said motion.

The Defendant moved the Court for a new trial due to improper admission of polygraph evidence. The Court, after hearing argument of counsel, denied said motion.

The Defendant moved the Court to conduct an evidentiary hearing to determine the circumstances surrounding the creation and custody of a certain alleged written statement said to have been authored by Rebecca Gragg on May 10, 2001. The Court, after hearing argument of counsel, denied said motion.

The Defendant moved the Court for a new trial based on claimed insufficient evidence to establish the guilt of the defendant. The Court, after hearing argument of counsel, denied said motion.

Report pursuant to Section 19.2-264.5. The report was considered and is ordered filed as a part of the record in accordance with the provisions of Section 19.2-264.5 of the Code of Virginia.

Before pronouncing the sentences, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

Sentencing. The Court enters judgment on the verdict of the jury and sentences the defendant to:

CR51115 - Death

It is further Ordered pursuant to 53.1-232 of the 1950 Code of Virginia, as amended, that the execution of the sentence shall occur on September 22, 2003.

Incarceration with the **Virginia Department of Corrections** for the term of:

CR51116 - five (5) years

CR51117 - life

CR51118 - three (5) years

These sentences shall run consecutively with each other and to all other sentences.

Court Costs. The defendant shall pay court costs.

Judgment For Court Costs. The Court orders the Clerk of this Court to docket a judgment against the defendant for the court costs.

DNA Analysis. The Court Orders that the defendant shall submit to the taking of a blood sample for DNA analysis pursuant to Section 19.2-310.2 of the 1950 Code of Virginia, as amended, et seq.

Right To Appeal. The Court proceeded to advise the defendant of his right to appeal these convictions and sentences.

Counsel for the defendant then moved for leave of Court to withdraw from future representation of the defendant. It was represented to the Court that Daniel Bromberg Esq. and Robert Klonoff, Esq. have agreed to represent the defendant on a *pro bono* basis in connection with his appeals hereafter. Mr. Bromberg, present in the courtroom, confirmed this. The defendant, upon inquiry by the Court, concurred with the motion. The Court, upon consideration of the above, granted the motion.

Attorney Certification. The Court certifies that at all times during the trial the defendant was personally present, as was defense counsel who capably represented the defendant.

Credit For Time Served. The defendant shall be given credit for time spent in confinement pursuant to Section 53.1-187 of the Code of Virginia.

ENTERED: May 30th, 2003

/s/
WILLIAM D. HAMBLEN
JUDGE

DEFENDANT IDENTIFICATION:

SSN: **232-82-4306** DOB: **11/13/1949** Sex: **Male**

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Death, life & eight (8) years

TOTAL SENTENCE SUSPENDED: None

VIRGINIA: IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 153

Hearing Date: May 22, 2003
Judge: William D. Hamblen

COMMONWEALTH OF VIRGINIA

v.

LARRY BILL ELLIOTT,
Defendant

SENTENCING ORDER

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CR51118	USE OR DISPLAY OF A FIREARM IN THE COMMISSION OF FIRST DEGREE MURDER	(F)	01/02/2001	18.2-53.1

The Potomac News moved the Court to allow still photography during today's sentencing hearing. The Court denied said motion.

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The Defendant moved the Court to conduct an evidentiary hearing to determine the circumstances surrounding the creation and custody of a certain alleged written statement said to have been authored by Rebecca Gragg on May 10, 2001. The Court, after hearing argument of counsel, denied said motion.

The Defendant moved the Court for a new trial based on claimed insufficient evidence to establish the guilt of the defendant. The Court, after hearing argument of counsel, denied said motion.

Report pursuant to Section 19.2-264.5. The report was considered and is ordered filed as a part of the record in accordance with the provisions of Section 19.2-264.5 of the Code of Virginia.

Before pronouncing the sentences, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

Sentencing. The Court enters judgment on the verdict of the jury and sentences the defendant to:

CR51115 - Death

It is further Ordered pursuant to 53.1-232 of the 1950 Code of Virginia, as amended, that the execution of the sentence shall occur on September 22, 2003.

Incarceration with the **Virginia Department of Corrections** for the term of:

CR51116 - five (5) years

CR51117 - life

CR51118 - three (3) years

These sentences shall run consecutively with each other and to all other sentences.

Court Costs. The defendant shall pay court costs.

Judgment For Court Costs. The Court orders the Clerk of this Court to docket a judgment against the defendant for the court costs.

DNA Analysis. The Court Orders that the defendant shall submit to the taking of a blood sample for DNA analysis pursuant to Section 19.2-310.2 of the 1950 Code of Virginia, as amended, et seq.

Right To Appeal. The Court proceeded to advise the defendant of his right to appeal these convictions and sentences.

Counsel for the defendant then moved for leave of Court to withdraw from future representation of the defendant. It was represented to the Court that Daniel Bromberg Esq. and Robert Klonoff, Esq. have agreed to represent the defendant on a *pro bono* basis in connection with his appeals hereafter. Mr. Bromberg, present in the courtroom, confirmed this. The defendant, upon inquiry by the Court, concurred with the motion. The Court, upon consideration of the above, granted the motion.

Attorney Certification. The Court certifies that at all times during the trial the defendant was personally present, as was defense counsel who capably represented the defendant.

Credit For Time Served. The defendant shall be given credit for time spent in confinement pursuant to Section 53.1-187 of the Code of Virginia.

Nunc Pro Tunc. It appearing to the Court that through clerical error, the order of May 22, 2003, incorrectly stated that the sentence imposed in CR51118 was "three (5) years", when the record shows that the sentence imposed in CR51118 was three (3) years, the Court, in accordance with Section 8.01-428(B) of the 1950 Code of Virginia, as amended, enters this order *nunc pro tunc* in place and stead of the order entered May 30, 2003.

ENTERED: June 13, 2003

/s/
WILLIAM D. HAMBLEN
JUDGE

DEFENDANT IDENTIFICATION:

SSN: **232-82-4306** DOB: **11/13/1949** Sex: **Male**

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Death, life & eight (8) years

TOTAL SENTENCE SUSPENDED: None

VIRGINIA:

***In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Thursday *the* 17th *day of* June, 2004.**

Larry Bill Elliott, **Appellant,**

against

Record Nos. 031610 and 031611
Circuit Court Nos. CR51115 through CR51118

Commonwealth of Virginia, **Appellee.**

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 5th day of March, 2004 and grant a rehearing thereof the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

U.S. CONSTITUTIONAL PROVISIONS

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIRGINIA CODE ANN. § 8.01-384(A)

§ 8.01-384. Formal exceptions to rulings or orders of court unnecessary; motion for new trial unnecessary in certain cases.

A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

N.J. Stat. Ann. § 2C:11-3c(4)(c)

2C:11-3. Murder

* * * *

c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced as provided hereinafter:

* * * *

4) The aggravating factors which may be found by the jury or the court are:

* * * *

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

S.D. Codified Laws § 23A-27A-1

23A-27A-1. Mitigating and aggravating circumstances considered by judge or jury. Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence:

* * * *

(6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age;

* * * *

Ga. Code Ann. § 17-10-30

17-10-30.

* * * *

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

* * * *

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

* * * *

11 Delaware Code § 4209(e)

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

* * * *

(e) Aggravating circumstances. —
(1) In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

* * * *

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.

* * * *

INSTRUCTION NO. 1

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00 Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance:

That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence of mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

1. Imprisonment for life; or

2. Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at:

1. Imprisonment for life; or

2. Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

Any decision you make regarding punishment must be unanimous.

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

Commonwealth of Virginia

-vs- **Criminal No. 51115, 51116, 51117 & 51118**

Larry Bill Elliott,

Defendant.

Manassas, Virginia
Thursday, April 3, 2003

The above-entitled matter came on to be heard with a jury, before the HONORABLE WILLIAM D. HAMBLEN, Judge, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 10:10 o'clock a.m.

* * *

[106]

* * *

THE COURT: Does the Commonwealth have argument in this matter?

MR. EBERT: Yes.

Ladies and gentlemen, let me again thank you. I know it has been an awesome burden for you to sit here and look at this evidence in the manner that you did. I want to thank you again on behalf of Mr. Willett and myself.

I want to tell you how much we appreciate your service and we really appreciate your attentiveness in all of the horrible evidence that you had to hear in this case.

The Court has told you what those punishments are in this case. You have been instructed on the firearm, it's anywhere three years to five years. With regard to the murder of Robert Finch, which is a first [107] degree murder charge,

you have a wide range of penalty, the maximum, which is life imprisonment.

And of course with regard to the murder of Dana Thrall, you have the option of the death penalty or life without parole.

I take no pleasure standing here and asking you to impose the death penalty. I know it's an awesome job. I take no pride in asking for it. But the law provides for it. The facts, I submit to you in this case, provides for it. And all of you have taken an oath that you can consider both options.

Now, what you folks do, as members of society and members of this community and the voice of this community will be acceptable to the Commonwealth, no matter what it is.

The Court has told you that in order to impose capital punishment in this case, you must determine that the murder was something more than an ordinary murder. He told you that it must be a vile act, the act of involving aggravated battery, a depraved mind.

I will submit to you the evidence in this case, and I'm not going to dwell on it much. You've heard all of the evidence in this case. It shows the act of a [108] vile murder, the act of a person who committed aggravated battery to Dana Thrall. The act of a person who pumped a number of shots into two innocent people.

Now, these are young folks. They had a good side and a bad side. But there were four people in that house. There were four people, who of course, are affected by what this man did. And the triple effect of that goes right throughout the entire family. You heard that evidence earlier today.

But it's clear evidence that these people were in their little castle. And this man entered in the night. And this man brutally shoots Robert Finch, leaving him in a pool of blood, Commonwealth's No. 3 and Exhibit No. 8. That's not enough.

You heard the evidence that there was a blood curdling scream. They screamed so much, it brought tears to their eyes, these big strong construction workers, not to mention the lady next-door.

And we know from the evidence that Dana was beaten with a blunt object about the head. It was consistent with the butt of a gun, some sort of a sharp object was used, according to the medical examiner to inflict the wounds on the front of her head. And then, [109] she, in effect, I would submit to you, executed, shot in the mouth. It goes out the side of the head.

The person, from the evidence, who committed these crimes had to reload. He emptied the gun. You heard the firearms expert tell you, there's no gun with that caliber that he is aware of that holds ten shots. The person would have had to shoot either five or six and reload, shoot either five more or four more, depending on the capability of that weapon.

I submit to you folks that's the vile part, inhumane. If there was ever a case that falls within the definition of aggravated battery, this case is it.

Two little boys are upstairs. And the person who committed this act, Mr. Elliott, knew that family. He knew there were little children there. He knew that two people lived there. He went there knowing full well that he was armed. He had a gun that was loaded and he had to reload it. And the evidence before you gives a little insight of the type of person he is.

He served his country. We don't dispute that. He has had a very important job. He has had training in surveillance, sort of a quasi law enforcement. I would submit to you, interrogation, counter surveillance, [110] interviewing techniques. He's an intelligent person. He's a smart person. He is not the type of person to get mad and angry. Everybody took the stand and told you that. He is the type of person who will try to solve a problem.

Maybe you could understand in a feel of rage, someone commits a murder. We don't have that here. We have an act of cold calculating person that I would submit to you from the evidence, he has to be a selfish person. He's a person who foresees a problem and no doubt preyed upon the fact that he could not get his way with Rebecca. That's how selfish he was. He's thinking, if I get rid of the problem, at least Robert, and poor Rebecca is at the wrong place at the wrong time. He had to take care of her too. Perhaps she'll like me more or maybe she will realize what a good person I am to take the life of a person for her, the same person from the evidence that she told you had sexual relations with her, according to him, while she was unconscious or sedated. Cold calculated person, much more dangerous than somebody that might be hot under the collar who wants to fight with their fist. No. He is a type of person that tells you I don't get angry, I get even.

[111] There was one witness that came before you folks that said he would solve a problem. There's an E-mail which is in evidence. I'm going to take care of your problem. He would normally solve it if it was a win-win situation.

Folks, in this case, it was a win-win situation for him, and he probably perceived it as a win-win situation for Rebecca. God knows it was a lose-lose situation for Rebecca Thrall and Robert Finch. They did not have to meet the faith that they met. It was a vile, horrible crime at the hands of a cold calculated individual.

I would submit to you those facts surely justify the imposition of the national penalty allowable by the law.

Folks, I'd like to ask you to think a little bit. Why do we have capital punishment? We know that if someone is put to death, they can't hurt anybody else.

MR. MOFFITT: I'm going to object. Future danger is not an issue in this case.

MR. EBERT: I think it's fair. We have capital punishment.

THE COURT: Let me see counsel at the bench.

[112] **BENCH CONFERENCE**

THE COURT: Future danger is not an issue in so far as it is not one of the potential aggravating circumstances available to the Commonwealth; correct? Was that your point?

MR. MOFFITT: Yes, sir.

THE COURT: In a more general sense, I think the Commonwealth is entitled to argue that the capital punishment, if carried out, would be to preclude him as a threat; is that your point?

MR. EBERT: Yes, sir.

THE COURT: I think they are entitled to argue that, not withstanding the ruling made previously.

MR. MOFFITT: My objection is overruled?

THE COURT: Yes.

MR. MOFFITT: Thank you.

OPEN COURT

MR. EBERT: We have a person put to death, he will no longer harm other individuals. We also know that the folks that you heard from here, they get some solace, some feeling that the person that took away my loved one, and you heard that evidence. It brings tears to your eyes. Some solace, some satisfaction knowing that this [113] man will pay the same price. And he deserves it. I would submit to you death would be, if you feel it is appropriate, it will be much more peaceful than that of Robert Finch.

Look at the effect of what this man did to these innocent people. You heard from the stand, those two little boys, in Exhibit 66 and 67, they will never be the same.

You heard how frightened they are, how they have to go to counseling. They talk about their mother. In many ways, they are certainly so unfortunate to have their only support system taken from them.

But they are fortunate to have folks like Cameron and Becky to take over in that role. But it has affected them. Cameron wants to be a career officer. He wants to be in combat. He's trained for that. That's all he thinks about. He is a warrior. He can't do it.

He has to be there so the children don't shiver at night. He has to be there so that they have some support system.

Rebecca feels the effects of it. She has to deal daily with what happens to those young children.

God knows, Mrs. Johnson, her mother, she told [114] you that she thinks about her every day. She'll never be the same.

So I suggest to you for those reasons, what happened on that night, what continues to happen and will continue to happen from here on out, this man deserves to pay the ultimate price. Maybe by what your action is here today, maybe the next person will think twice. I'm sure there's some people out there that contemplate murder and they never think about the consequences. But even if there's one, or if there's two, the next Elliott that becomes involved with someone, perceives a problem that he must solve, he's going to take the life of other people rather than himself, which he professed he wanted to do, maybe a person such as this man will think twice.

And then society in which we live will be a better place in which to live. Folks, as hard is it is to ask you, there's no more just penalty than to sentence this man to death, and I ask you to do so.

* * *

(2)

No. 04-515

Supreme Court, U.S.
FILED
NOV 15 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

JERRY KILGORE
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Counsel for Respondent

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should certiorari be granted to review petitioner's challenge to Virginia's vileness aggravating factor even though this Court is without jurisdiction to consider it because the Supreme Court of Virginia expressly refused to consider the issue due to petitioner's failure to preserve it properly?

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STATEMENT OF THE CASE

I. Proceedings

Larry Elliott had two capital murder trials. In 2002, he was tried by a jury in the Circuit Court of Prince William County, Virginia, found guilty of capital murder and sentenced to death. In a post-trial hearing, the circuit court granted Elliott's motion for a new trial on the basis of an after-discovered claim of juror bias.

The new trial commenced with the empanelling of a new jury on March 25, 2003. On April 2, 2003, the new jury found Elliott guilty of the capital murder of Dana Thrall in the commission of the killing of Robert Finch. Va. Code § 18.2-31(7) (capital murder offense defined as the willful, deliberate and premeditated killing of more than one person as part of the same transaction). The jury also found him guilty of the use of a firearm in the commission of capital murder, the first-degree murder of Robert Finch and the use of a firearm in the commission of first-degree murder. After a separate sentencing hearing, the jury sentenced Elliott on April 4, 2003, to death for the capital murder, life in prison for the first-degree murder and a total of eight years in prison for the firearms offenses. The jury based the death sentence on Virginia's aggravating factors of torture, aggravated battery and depravity of mind. Va. Code § 19.2-264.4. On May 22, 2003, the trial court held a post-verdict hearing at which it considered the probation officer's report and argument of counsel. The court imposed the sentences which had been fixed by the jury. The court entered final judgment on June 13, 2003.

On March 5, 2004, the Supreme Court of Virginia unanimously affirmed Elliott's capital murder conviction and death sentence. *Elliott v. Commonwealth*, 593 S.E.2d

270 (Va. 2004). On June 17, 2004, the Court denied his petition for rehearing. Elliott filed his certiorari petition on October 15, 2004.

II. Facts

At 4:00 a.m. on January 2, 2001, the murdered body of Robert Finch was found by police officers in Finch's townhouse. They also found, lying in the kitchen in a pool of blood, the wounded body of Dana Thrall, Finch's girlfriend who lived there. Thrall had been shot numerous times in her head and chest and had been beaten in her head. She died a short time later, leaving two small sons who were in the house during the murders. Shortly before the murders, Larry Elliott was seen in the neighborhood. Forensic evidence showed conclusively that Elliott's DNA was contained in blood Elliott left on the fence gate in Finch's backyard. Elliott, a married man, had become heavily involved in a relationship with Rebecca Gragg, Finch's ex-girlfriend. Elliott knew that Gragg was in the midst of a heated child-custody proceeding with Finch who was the father of Gragg's children. Shortly before the murders, Gragg told Elliott that she and Finch had resumed a romantic relationship. At the time of the murders, Gragg was driving home to Virginia from a vacation with her children in Florida. *Elliott*, 593 S.E.2d at 273-78.

The Virginia Supreme Court found as follows concerning Elliott's challenge to Virginia's aggravating factors:

> Prior to the [first] trial, Elliott had filed numerous motions, among which were motions to have the Virginia capital murder and death penalty statutes declared unconstitutional and to have the jury instructed that, if the Commonwealth

presented evidence of vileness during the penalty determination phase of the trial, the jury was to be unanimous in its determination of the elements of the act that caused it to be vile. The trial court denied these motions without comment. After the mistrial was declared, Elliott did not renew any of these motions or otherwise request that the trial court adopt the pre-trial rulings of the first trial and apply them to the conduct of the retrial.

The trial court, having ruled that the Commonwealth could not argue Elliott's future dangerousness to society as an aggravating factor supporting the imposition of the death penalty, ruled that the case would be submitted to the jury only on the vileness aggravating factor. During consideration of the jury instructions, Elliott's counsel stated that he agreed with the proposed instruction which, in relevant part, defined the vileness aggravating factor as requiring that the murder of Thrall "was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery of the victim beyond the minimum necessary to accomplish the act of murder."

Elliott did not request an instruction requiring that the jury agree unanimously on the basis for finding the murder to have been vile, as he had requested in his pre-trial motion prior to his first trial. Rather, Elliott's sole assertion at this point was that, "for the record," he objected to the jury being instructed on capital murder because the evidence would not support a finding that the murder of Finch was vile. While conceding that he had no authority other than "a new article [he had] read," Elliott's counsel contended that where the capital murder charge was premised

> on there having been one or more killings as part of the same transaction, the jury was required to find that all the killings were vile. The trial court overruled this objection and again asked if Elliott concurred with the instructions. Elliott's counsel replied, "Yes, other than the objection I've made."

Elliott, 593 S.E.2d at 278.

The Virginia Supreme Court found as follows concerning the sentencing phase of trial:

> Code § 17.1-313(C)(1) requires that we determine whether the jury imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Elliott makes no particularized argument that the jury's verdict was not the product of a reasoned and dispassionate deliberation. Nor does our review of the record in this case disclose that the jury failed to give fair consideration to all the evidence both in favor and in mitigation of the death sentence, or was otherwise improperly influenced in favor of imposing the death penalty. Accordingly, we hold that the sentence of death was not imposed under passion, prejudice, or any arbitrary factor.
>
> With respect to the consideration "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Code § 17.1-313(C)(2), Elliott contends that "the Commonwealth has never imposed such a sentence upon a man with as long and accomplished a record of service to his country as" Elliott. He further contends that "this case lacks the characteristics that normally distinguish the cases in which the death penalty is imposed based upon

multiple homicides and vileness from those in which juries choose to impose life imprisonment."

During the penalty determination phase of the trial, the jury heard testimony recounting Elliott's service as a soldier and non-commissioned officer in, and later as a civilian employee of, the United States Army. The jury also heard evidence throughout the course of the trial that Elliott betrayed his wife of twenty-three years, pursuing a former prostitute and squandering hundreds of thousands of dollars on this illicit relationship. The evidence showed that Elliott murdered two innocent people in a brutal and premeditated manner, showing no remorse for and purposefully seeking to conceal his crimes. The murder of Thrall was particularly heinous in that it appears she was a victim of opportunity, killed while her young children were nearby and simply because she was present in the home with Finch or perhaps because she saw and could have identified Elliott.

The jury could reasonably have concluded from Elliott's actions in his secret relationship with Gragg that he had renounced the values he purported to support and follow in his public life. Faced with the incongruent reality of Elliott's two lives, the jury was well within its province to determine that the mitigating value of Elliott's years of service in the armed forces did not outweigh his culpability for the death of Thrall under the circumstances of that murder. . . .

Even though no two capital murder cases are identical, we are confident that, given the heinousness associated with the murder of Thrall, the sentence of death imposed on Elliott is neither excessive nor disproportionate to sentences

> generally imposed by other sentencing bodies in this Commonwealth for crimes of a similar nature considering the crime and this defendant.

Elliott, 593 S.E.2d at 280-281, 291-292 (citations omitted).[1]

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[1] Elliott presents inaccurate statements of fact. At page 4 of his petition, he states that Gragg told the police she was going to kill either Finch or herself; in fact, what Gragg told the officer was that, *if she stayed with Finch*, she was going to kill herself. (JA 544). Elliott states on the same page of his petition that Gragg "had [Finch] beaten in February, 1999;" however, the trial court properly *excluded* Elliott's proffered evidence on this issue which consisted of an affidavit filed by Finch during the couple's custody battles, *Elliott*, 593 S.E.2d at 288, and which Gragg denied under oath at Elliott's trial. (JA 548). Elliott states on page 6 of his petition that a polygraph test showed "Gragg was lying when she denied having planned to have Finch killed;" however, while the defendant argued below outside the presence of the jury that the police had informed Gragg that she had tested deceptive on a polygraph test, the record does not disclose the questions on which she tested deceptive. At page 9 of his petition, Elliott states that a "witness mentioned that Gragg had been questioned by a 'polygrapher'" in the presence of the jury; however, the witness never affirmatively stated that Gragg had been questioned by a polygrapher but rather, when asked by defense counsel if the witness knew an Officer Meyers who had interviewed Gragg, the witness asked counsel, "I believe you're referring to the polygrapher?" because there were two officers by that name. *Elliott*, 593 S.E.2d at 283; (JA 2116-18). Finally, Elliott states that the trial court "refused to require the Commonwealth to remedy false testimony" from Gragg; however, Elliott made no objection to Gragg's testimony as false and in fact expressly told the trial court that he did not ascribe to the Commonwealth any misconduct and was making no charge of presenting perjured testimony. *Elliott*, 593 S.E.2d at 286-87.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. The Court Below Found Petitioner's Challenge To The Vileness Factor Waived.

The petitioner argues that certiorari should be granted to decide whether Virginia's statutory vileness factor is unconstitutional. He states that the court below "summarily rejected" his argument and "also" found the claim not "properly preserved." In fact, the Virginia Supreme Court's *ratio decidendi*, after extensive analysis and discussion, was that Elliott waived his constitutional challenge when he failed to present it to the trial court after the mistrial had been declared and the second trial commenced:

> In his fifteenth assignment of error, Elliott contends that the trial court erred in overruling his motion to have Virginia's capital murder and death penalty statutes declared unconstitutional "on the ground that the 'vileness' aggravator . . . is unconstitutionally vague on its face and as applied in this case and therefore fails to provide meaningful guidance to the jury." This contention is an amalgam of three arguments raised by Elliott in the omnibus motion filed prior to his first trial challenging the constitutionality of the capital murder and death penalty statutes.
>
> In his sixteenth assignment of error, Elliott contends that "the trial court erred in failing to instruct the jury on the narrowing construction of the 'vileness' aggravator adopted by this Court." n9 Although it is not entirely clear from the argument he makes on brief with respect to this assignment of error, it would appear that Elliott is asserting the same argument as was made in one section of the omnibus motion to have the

capital murder and death penalty statutes declared unconstitutional filed prior to his first trial. In any event, we can find nothing in the record of his second trial to suggest that he sought an instruction giving a "narrowing construction" of the vileness aggravator.

> n9 Elliott does not expressly state how the definition of the vileness aggravating factor should have been narrowed or limited in jury instructions. Presumably, Elliott is contending that the killing of Thrall lacked one or more of the elements tending to show that it involved "torture, depravity of mind or an aggravated battery to the victim." Elliott provides no authority for his assertion that this Court has "adopted" instructions to this effect, although we have permitted trial courts the discretion to provide further guidance as to the meaning of these terms.

In his seventeenth assignment of error, Elliott contends that "[t]he trial court erred in denying appellant's motion to instruct the jury to agree unanimously upon a single element of 'vileness.'" This argument was also raised in the omnibus motion filed prior to Elliott's first trial and in a separate motion filed prior to the first trial seeking a specific jury instruction. Elliott did not proffer an instruction to this effect during the penalty determination phase of his second trial.

The Commonwealth asserts that because Elliott did not renew the pre-trial motions from his first trial or ask that the trial court adopt its prior rulings on those motions in his second trial, he failed to preserve these issues for appeal. The

Commonwealth further contends that by agreeing to the jury instruction defining the vileness aggravating factor in his second trial and not proffering any alternative instructions, he has waived his claims that the trial court should have given "narrowing construction" and "single element of vileness unanimity" instructions.

In his reply brief, Elliott asserts that he was not required to reassert his pre-trial motions from his first trial because "the rulings in the first trial automatically carry over to the second one." For the same reason, Elliott contends that he was not required to proffer his alternative instructions limiting the vileness aggravating factor or requiring a unanimous determination of the elements making the crime vile, because the trial court had ruled on these issues prior to his first trial.

The cases that Elliott relies upon for his assertion that rulings from a mistrial carry over to a subsequent retrial are inapposite and distinguishable. . . .

We concur in the view expressed by the Commonwealth in the present case that when a criminal case ends in a mistrial, the rulings made by the trial court prior to or during the aborted trial do not automatically carry over to a subsequent retrial. Thus, a defendant may not rely upon objections made at an aborted trial to preserve issues for appeal following his conviction in a subsequent trial. *See, e.g., United States v. Palmer*, 122 F.3d 215, 221 (5th Cir. 1997) ("objections made at the aborted trial have no bearing on the retrial, as the two are entirely separate affairs"). Similarly, a defendant may not assert that rulings made on pre-trial motions

> prior to a mistrial are binding upon the trial court in a subsequent trial unless the trial court adopts those rulings on its own motion or in addressing a motion of one or both of the parties. . . . In the absence of a ruling in the second trial adopting the rulings of the aborted trial, the defendant is required to renew his motions with specificity in order to preserve the record of the trial court's rulings and the defendant's objections thereto for any subsequent appeal of the retrial.
>
> Elliott does not assert that the trial court adopted its prior rulings for purposes of his second trial, and we have not been directed to any place in the record where such was done or requested. *Accordingly, we hold that under these circumstances Elliott is barred from raising the issues asserted in this appeal in assignments of error fifteen, sixteen, and seventeen.* Additionally, we also agree that Elliott's failure to proffer in his second trial alternative instructions limiting the definition of the vileness aggravating factor or requiring unanimity on the elements of vileness acts as a waiver of the claim that the trial court should have given such instructions to the jury. n10
>
> > n10 We note further that, as framed within the omnibus pretrial motion challenging the constitutionality of Virginia's capital murder and death penalty statutes, Elliott's contention that the vileness aggravating factor is vague is a reassertion of an argument previously rejected by this Court on numerous occasions. . . .

Elliott, 593 S.E.2d at 288-90 (emphasis added).

The fact that the court below observed in a footnote that Elliott's assignment of error *also* was one which the court had rejected on its merits "on numerous occasions," cannot confer jurisdiction upon this Court to review the issue on its merits. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court made clear that,

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . This rule applies whether the state law ground is substantive or procedural. . . . In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Coleman, 501 U.S. at 729-30.

The Virginia Supreme Court rejected Elliott's claim of constitutional error on state law grounds independent from any federal law issue. The fact that it observed in a footnote that the claim also had no merit does not, and cannot, affect its independent judgment that the issue was waived by Elliott's non-compliance with state procedural

law. This Court thus lacks jurisdiction to entertain Elliott's claim on direct review of the state court's judgment.

Elliott's attempt to argue that the Virginia Supreme Court's state law procedural ruling was not "adequate" is groundless. (Pet. at 23-25). The court below regularly, even strictly, enforces its rule that objections will not be addressed on appeal which have not been preserved properly in the trial court. *See, e.g., Murray v. Carrier*, 477 U.S. 478 (1986). Every defendant in Virginia is on notice during a retrial that the record which will go up on appeal is that concerning the judgment under review. *See* Rule 5:10, *Rules of the Supreme Court of Virginia* (identifying the record on appeal as containing, for example, instructions given at the trial and exhibits offered into evidence); Rule 5:25 (no error sustained to ruling of trial court unless a contemporaneous objection was made). A retrial is a *new* trial and, unless there is an order from the court that specifies objections will continue from one trial to the next, the new trial starts with a clean slate. Indeed, that clearly was Elliott's understanding during his new trial because he in fact renewed motions before that new trial repeating his first trial's pretrial motions asking for allegedly exculpatory evidence regarding a Commonwealth's witness.

Elliott's recitation of Virginia Code § 8.01-384(A) is inapplicable: the statute simply removed the ancient duty of a party to make a "formal exception" to a ruling of a trial court once a contemporaneous objection has been made. It did not address in any way the obvious duty of a party to make the contemporaneous objection *during the trial which will be reviewed on appeal*. Finally, Elliott says that the rule applied in his case serves no "legitimate state interest" because it is merely a "renewal" requirement, such as the "formal exception" requirement done away

with by modern law. To the contrary, the rule that a party must bring to the attention of the trial court *during the trial* his objections, certainly is not a meaningless ritual. It serves the legitimate state interests of seeing that error is corrected at the earliest possible time and that a full record of the trial court's ruling may be examined on appeal. Elliott's clear failure to follow Virginia's settled contemporaneous objection rule disentitled him to complain on appeal.

II. Virginia's Vileness Aggravator Presents No Federal Issue And Is Not Vague.

A. Virginia's sentencing phase aggravating factors are not necessary to satisfy constitutional "narrowing" requirements.

Elliott complains about the adequacy of Virginia's penalty phase "vileness" aggravator – that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved . . . depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.4.[2] He asserts this factor fails to satisfy the state's constitutional obligation to narrow the class of defendants eligible for the death penalty. This Court, however, has made clear that the "narrowing function required for a regime of capital punishment may be provided in either of these two ways: the legislature may itself narrow the definition of capital offenses so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and

[2] Elliott does not challenge the jury's finding that his capital murder of Dana Thrall also constituted torture.

provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). Where the "narrowing function" is performed at the guilt phase, "[t]he fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process. . . ." *Id.* (Rejecting argument that death sentence was infirm because Louisiana's sentencing phase aggravating factor duplicated a guilt phase element of capital murder).

Because Virginia's system, like Louisiana's, narrows the class of persons for whom a death sentence is appropriate in the *guilt phase* through narrowly defined categories of capital murder, *see* Va. Code § 18.2-31, the additional sentencing phase aggravating factors are constitutional surplus under *Lowenfield*. Moreover, because Virginia is a *non-weighing* state, *see Tuggle v. Netherland*, 79 F.3d 1386, 1389 (4th Cir.), *cert. denied*, 519 U.S. 894 (1996), in which the constitutionally required narrowing function is satisfied in the *guilt* phase, an Eighth Amendment error cannot exist by virtue of the jury's superfluous finding of an additional sentencing phase aggravating factor. *See Stringer v. Black*, 503 U.S. 222, 231-32 (1992) (rejecting Mississippi's *Lowenfield* argument because Mississippi is a *weighing* state and "the difference between a weighing State and a nonweighing State is not one of 'semantics,' . . . but of critical importance. In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty.").

In other words, before Elliott's jury even entered the sentencing phase of trial, it already had performed the constitutionally required narrowing function by finding that Elliott had committed capital murder, defined as *the willful, deliberate and premeditated killing of more than one person in the same transaction*. Va. Code § 18.2-31(7). His case thus already had been narrowed by independent findings at the guilt phase: premeditation and a multiple murder. The question of whether or not the later, additional finding of the "vileness" factor in Elliott's non-weighing sentencing proceeding could be considered "vague" was irrelevant because the narrowing function of the aggravating factors already had been carried out during the guilt phase. Elliott's "vagueness" argument simply presents no compelling reason to grant certiorari because the issue cannot render his death sentence constitutionally invalid.

B. Virginia's "vileness" criteria of "depravity of mind" and "aggravated battery" are neither unconstitutional on their face nor as applied in Elliott's case.

In Elliott's case, the defendant's conduct clearly involved "depravity of mind" and "aggravated battery." "The evidence showed that Elliott murdered two innocent people in a brutal and premeditated manner, showing no remorse for and purposefully seeking to conceal his crimes. The murder of Thrall was particularly heinous in that it appears she was a victim of opportunity, killed while her young children were nearby and simply because she was present in the home with Finch or perhaps because she saw and could have identified Elliott." *Elliott*, 593 S.E.2d at 291. And the case for aggravated battery was beyond

dispute: the multiple gunshot wounds to Thrall's head and chest and the beating to her head which left her alive for a period of time, moaning in agony, unquestionably was vile under any definition.

As early as *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978), *cert. denied*, 441 U.S. 967 (1979), the Virginia Supreme Court narrowly defined the "vileness" sentencing phase aggravating factor. It defined "aggravated battery" as "a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 248 S.E.2d at 149. It defined "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.* The Virginia Supreme Court made clear that the Virginia legislature meant for these two aggravating factors to require more proof than simply what is required for an intentional killing. *Id.* Thus, in every case since *Smith* involving the "vileness" aggravating factors of "depravity of mind" and "aggravated battery" in which the sufficiency of the evidence of vileness was challenged, the Virginia Supreme Court has applied its narrowing definitions to the facts of the case.

Indeed, contrary to Elliott's misreading of *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Virginia "vileness" factor recited above is *identical* to the factor held to be facially constitutional in both *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Godfrey*, 446 U.S. at 432-33. The reason the Court found error in *Godfrey* was not because the vileness factor was facially unconstitutional, but because the Georgia Supreme Court in that case had upheld the death sentence on nothing more than a finding that the offense

was "outrageously or wantonly vile, horrible and inhuman." *Godfrey*, 446 U.S. at 428. In fact, in *Godfrey*, the prosecutor had stated *three* times in argument that the case *did not involve torture or aggravated battery* and the jury's verdict merely recited that the offense was "outrageously or wantonly vile, horrible and inhuman" without any reference to "aggravated battery," "depravity of mind," or "torture." *Id.* at 426. Of course, the facts of *Godfrey* bore out the prosecutor's concessions: the defendant engaged in an argument with his wife, grabbed a shotgun, followed her to her mother's home, shot his wife through a window killing her instantly with one shot, shot and killed her mother, again instantly with one shot, and then immediately called the police, waited until they arrived, and made a full confession. *Id.* at 425.

Moreover, it is equally clear that the Virginia Supreme Court long has held that such aggravated assaults as is demonstrated by Elliott's crimes fully satisfy all of the vileness components. *See Bennett v. Commonwealth*, 374 S.E.2d 303 (Va. 1988) (defendant bound, beat, and stabbed victim); *Boggs v. Commonwealth*, 331 S.E.2d 407 (Va. 1985) (defendant beat his 87-year-old neighbor with a piece of steel and then stabbed her); *Bunch v. Commonwealth*, 304 S.E.2d 271 (Va. 1983) (defendant shot his lover in the head, ransacked her house, and hung her from a doorknob); *LeVasseur v. Commonwealth*, 304 S.E.2d 644 (Va. 1983) (defendant beat victim and stabbed her with a carving fork and ice pick); *Whitley v. Commonwealth*, 286 S.E.2d 162 (Va. 1982) (defendant strangled victim, cut her throat, and inserted umbrellas into her anus and vagina *post-mortem*); *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979) (defendant entered house with co-conspirators, robbed victim, and then choked and beat her to death).

The Virginia Supreme Court's application of its "vileness" definitions raises no federal constitutional issue meriting further review, even if it had applied those definitions in this case instead of finding the issue waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Commonwealth of Virginia,
Respondent herein.

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(4)

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No. 04-515

IN THE

Supreme Court of the United States

LARRY BILL ELLIOTT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The petition demonstrated that this case merits review because (i) the decision below violates *Godfrey v. Georgia*, 446 U.S. 420 (1980), and conflicts with the decisions of other courts applying *Godfrey*, Pet. 13-19; (ii) this case raises an important and recurring question, which will not be resolved without this Court's intervention, Pet. 20-22; and (iii) this Court has jurisdiction over this case, and this case is in fact a good vehicle for considering the question presented because, among other things, petitioner would not have been eligible for the death penalty had narrowing constructions adopted by other states been applied, Pet. 22-26.

The Commonwealth has no real answer to these points. It does not contest most of them. The Commonwealth does not dispute that the decision below conflicts with decisions of other state courts. Nor does it deny that this case presents an important and recurring question, which will not be resolved unless this Court intervenes. The Commonwealth also does not dispute that this case raises the question presented clearly or that petitioner would be ineligible for the death penalty under the narrowing constructions adopted by other states.

Moreover, the Commonwealth's responses to the remaining points made in the petition are unpersuasive. Although it asserts that the procedural default found below deprives this Court of jurisdiction, Opp. 7-13, the Commonwealth does not rebut the petition's showing that this default was based on a procedural rule that is novel, serves no legitimate state interest, and therefore is not adequate to preclude review of a constitutional challenge. The Commonwealth also claims that its vileness aggravator does not violate *Godfrey*, Opp. 13-18, but it fails to undermine the petition's showing that the aggravator directly conflicts with *Godfrey* and its progeny. Thus, the Commonwealth has not cast any doubt upon the petition's demonstration that this case warrants review.

1. The petition demonstrated that the procedural rule invoked below, which requires all pretrial motions to be renewed after a mistrial, is not an adequate state ground for several reasons: petitioner's challenge to the constitutionality of the Commonwealth's vileness aggravator was plainly and reasonably raised, the requirement that pretrial motions be renewed after a mistrial is not a "'firmly established and regularly followed state practice,'" and that requirement does not serve any legitimate state interest. Pet. 23-26 (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). The Commonwealth does not dispute the first point, and it fails to undermine the other two.

a. The Commonwealth does not seriously dispute that the renewal requirement was novel. For example, it does not dispute that the decision below is the first case in Virginia to announce this requirement. Pet. 23. Nor does it dispute that the requirement contradicts the generally accepted rule that pretrial motions need not be renewed after a mistrial. Pet. 24. Finally, the Commonwealth does not dispute that the cases cited below in support of the renewal requirement do not apply that requirement. *Id.*

Instead, the Commonwealth asserts that Elliott understood the renewal requirement because he renewed his "pretrial motions asking for allegedly exculpatory evidence regarding a Commonwealth's witness." Opp. 12. That is simply not true. After the mistrial, petitioner did not renew his pretrial motion for disclosure of exculpatory evidence; he moved for disclosure of *additional* exculpatory evidence. Petitioner filed an eleven-page pretrial motion seeking disclosure of all exculpatory information in the Commonwealth's possession. JA 5-11. After the mistrial, he filed two much shorter motions seeking disclosure of documents that were not revealed until Rebecca Gragg's testimony in the first trial. JA 206-07, 212-14. Thus, as the Commonwealth acknowledged at the time, far from renewing a pretrial motion, the motions filed after the mistrial sought

"*supplemental* exculpatory evidence." JA 232 (emphasis added).

The Commonwealth also suggests that the first trial was not part of the record on appeal. Opp. 12. In fact, the trial court included the entire first trial in the record certified to the Virginia Supreme Court, JA 361-69, and the appendix submitted below contained hundreds of pages from the first trial. JA 1-205.

The Commonwealth suggests as well that Virginia Code § 8.01-384(A) only removes the requirement of making a formal exception "once a contemporaneous objection has been made." Opp. 12. That is incorrect. As previously noted, this provision excuses parties from renewing pretrial motions at trial. Pet. 22 (citing *Chawla v. Burgerbusters, Inc.*, 499 S.E.2d 829, 832-33 (Va. 1998); *King v. Commonwealth*, 570 S.E.2d 863, 866 (Va. 2002)). Moreover, the Commonwealth does not – and cannot – point to anything in this provision that renders it inapplicable after a mistrial. To the contrary, as the petition demonstrated, Pet. 24, Section 8.01-384(A) excuses parties from renewing any objection "known to the court." Va Code § 8.01-384(A). Thus, the Virginia Supreme Court's requirement that pretrial motions be renewed after a mistrial was not only novel; it was also unforeseeable and therefore cannot bar this Court from reviewing petitioner's constitutional challenge. *See, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

b. The Commonwealth has not identified any legitimate state interest in requiring renewal of pretrial motions after a mistrial. It asserts that the Commonwealth has a legitimate interest in requiring parties to bring their objections "to the attention of the trial court *during the trial*." Opp. 13. However, as just noted, parties are not ordinarily required to renew pretrial challenges at trial. *See, e.g.*, *King*, 570 S.E.2d at 866; *Chawla*, 499 S.E.2d at 832-33. As a consequence, the question here is not whether the

Commonwealth has an interest in requiring renewal of pretrial motions at trial – as shown above, Section 8.01-384(A) disclaims any such interest – but rather whether it has an interest in requiring renewal of such motions when there has been a mistrial. The Commonwealth does not identify any such interest. For this reason as well, the renewal requirement is not an adequate ground for precluding review of petitioner's constitutional challenge. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990).

2. Although the Commonwealth does not dispute that the instruction given the jury on the vileness aggravator was essentially identical to the jury instruction given in the *Godfrey* case, it nonetheless argues that *Godfrey* is distinguishable and that the vileness aggravator employed in this case was constitutional. Opp. 13-18. Because it is undisputed that the decision below conflicts with decisions of other state supreme courts, and that conflict is by itself sufficient grounds for granting certiorari, *see* S. Ct. R. 10(b), it is not necessary at this stage to address the Commonwealth's merits arguments. In any event, those arguments are meritless.

a. The Commonwealth asserts that *Godfrey* is inapplicable here because the vileness aggravator is "constitutional surplus" under Virginia's capital sentencing scheme. Opp. 14. According to the Commonwealth, under this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), Virginia's definition of capital murder performs the constitutionally required narrowing function. Opp. 14. Virginia has, however, chosen to use the vileness aggravator in the eligibility, not the selection, phase of its capital sentencing procedures, and it must therefore define the aggravator in a clear and definite manner. As the petition pointed out, Pet. at 16 n.4, "the Eighth Amendment requires *both* that the class of persons eligible for the death penalty be narrowed *and* that the jury's discretion be channeled through clear and definite standards." *Tuilaepa v. California*, 512

U.S. 967, 971-73 (1994); *see also Walton v. Arizona*, 497 U.S. 639, 665 n.* (1990) (Scalia, J., concurring in part and concurring in the judgment) ("no matter how narrowly the crime is defined," this Court's decisions "requir[e] aggravating factors to be specified *whenever* the sentencer is given discretion" to determine eligibility for the death penalty).

Nor do the decisions cited by the Commonwealth suggest otherwise. *Lowenfield* did not consider a vagueness challenge; the question before the Court in that case was whether an individual may be sentenced based on an aggravating circumstance that duplicates an element of the underlying crime. *See* 484 U.S. at 241-46. Moreover, far from supporting the Commonwealth's reliance on *Lowenfield*, the Court's decision in *Stringer v. Black*, 503 U.S. 222 (1992), observed that "*Lowenfield* did not involve a claim that a statutory aggravator was ambiguous, and its relevance to *Godfrey* . . . is slight at best." 503 U.S. at 236.

b. The Commonwealth argues that *Godfrey* is essentially limited to its facts. As the Commonwealth would have it, *Godfrey* held the vileness aggravator applied in that case unconstitutional because the sentence there was based "on nothing more than a finding that the offense was 'outrageously or wantonly vile, horrible, and inhuman.'" Opp. 16-17 (quoting *Godfrey*, 446 U.S. at 428 (plurality op.)). That is wrong. *Godfrey* did not rest upon infirmities in the jury verdict; to the contrary, in finding that Georgia's vileness aggravator was unconstitutionally vague as applied, *Godfrey* held that the Georgia Supreme Court had failed to apply a constitutional construction of the depravity prong of the aggravator. *See* 446 U.S. at 429-33 (plurality op.); *see also id.* at 434 (Marshall, J., concurring in the judgment) (joining the Court's conclusion that "no . . . narrowing construction was read to the jury or applied by the Georgia Supreme Court on appeal"). Accordingly, numerous subsequent decisions, both from this Court and from other

states with vileness aggravators, have recognized that *Godfrey* announced a principle extending far beyond its particular facts. Pet. 14-15; *see also Stringer*, 503 U.S. at 228-29 (recognizing that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case").

The Commonwealth asserts as well that petitioner's conduct "clearly involved" depravity of mind and that "the case for aggravated battery was beyond dispute." Opp. 15-16. The petition, however, showed that the evidence presented below would not have been sufficient to make petitioner eligible for the death penalty under narrowing constructions applied by other states with vileness aggravators. Pet. 26 (noting that there was no evidence that petitioner acted for the sheer pleasure of killing as required by New Jersey's depravity prong); *id.* (noting no evidence of intent to inflict unnecessary pain and suffering as required by South Dakota's aggravated battery prong); *id.* (noting no evidence of a battery separate and distinct from the conduct causing death as required by Georgia). The Commonwealth's brief does not dispute this showing.

The Commonwealth also asserts the "jury's finding that his capital murder of Dana Thrall also constituted torture" is unchallenged. Opp. Br. 13 n.2. In fact, the Commonwealth did not even ask the jury to find torture, App. 62a-67a, and the jury entered a general verdict that does not indicate any such finding. App. 45a. Furthermore, as previously pointed out, because the jury entered a general verdict, petitioner's sentence is tainted if any one of the prongs of the vileness aggravator is unconstitutionally vague. Pet. 15-16.

Finally, the Commonwealth asserts that the Virginia Supreme Court has "narrowly defined" the vileness aggravator. Opp. 16. This assertion is meritless. In the first place, the Virginia Supreme Court's construction was not provided to the jury and is therefore irrelevant. *See Ring v.*

Arizona, 536 U.S. 584 (2002). Furthermore, as the petition showed, Virginia's construction of its vileness aggravator is far broader and vaguer than the constructions adopted by other states with similar aggravators. Pet. 19; *see also* Pet. 16 (noting that the aggravated battery instruction below made that term "even more ambiguous and confusing"). In fact, as *amici* point out, the Virginia Supreme Court has given such an elastic meaning to the aggravated battery and depravity prongs of the Commonwealth's vileness aggravator that these prongs "act effectively as catch-alls, sweeping within their potential scope almost any fact scenario." Brief of *Amici* Nat'l Ass'n of Criminal Defense Lawyers and Virginia Ass'n of Criminal Defense Lawyers at 7-8. Indeed, the murder in *Godfrey* could have been found vile under Virginia's aggravator for any number of reasons. *See id.* at 8-9. Thus, like the Virginia Supreme Court for the last twenty years, the Commonwealth fails to reconcile its vileness aggravator with *Godfrey*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-515

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Respondent.

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2, the National Association of Criminal Defense Lawyers ("NACDL") and the Virginia Association of Criminal Defense Lawyers ("VACDL") respectfully request leave to file the attached brief *amici curiae* in support of Petitioner, Larry Bill Elliott. Petitioner has consented to the filing of the brief. Counsel for Respondent has not consented to the filing of the brief.

NACDL is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public

defenders, and law professors. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. NACDL has appeared as *amicus curiae* in this Court on numerous occasions.

VACDL – formerly the Virginia College of Criminal Defense Attorneys before it became an affiliate of NACDL – is a statewide organization of attorneys whose practice primarily focuses on the representation of those accused of criminal violations. VACDL seeks to improve the quality of justice in Virginia by working to ensure fairness and equality before the law.

In this case, the Virginia Supreme Court affirmed Petitioner's death sentence based upon a "vileness" aggravator, which the trial court applied without a narrowing construction. The vileness aggravator used by the jury to sentence Petitioner to death is virtually indistinguishable from the vileness aggravator that this Court held to be a violation of the Eighth Amendment in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Amici*'s members are actively involved in representing defendants in capital cases. The members of both organizations have represented thousands of individuals charged with capital crimes. *Amici* can therefore bring the extensive experience of their members to bear on the issues before this Court. Moreover, because the Virginia Supreme Court's decision conflicts with this Court's precedents and violates the Constitution, *amici* have an interest in having that decision overturned.

NACDL and VACDL can bring an important perspective to the issues before this Court and, for the foregoing reasons, respectfully request leave to file the attached brief *amici curiae* in support of the petition.

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INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set forth in the accompanying Motion for Leave to File Brief *Amici Curiae*.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

Almost thirty years ago, this Court raised questions about the vagueness of the "vileness" aggravator in Georgia's death penalty scheme. *See Gregg v. Georgia*, 428 U.S. 153 (1976). Four years later, after the Georgia courts failed to heed the Court's concern, the Court invalidated a death sentence, finding that the guidance given to the jury by Georgia's vileness aggravator did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (footnote omitted). Since *Godfrey*, the Court has repeatedly reaffirmed the principle that a state that elects the death penalty has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.*; *see also Maynard v. Cartwright*, 486 U.S. 356, 363 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 & n.15 (1983).

Despite having a vileness aggravator virtually identical to that at issue in *Godfrey*, the Commonwealth of Virginia has repeatedly failed to narrow its breadth to conform to the Eighth and Fourteenth Amendments and to this Court's ruling in *Godfrey*. As a result, Virginia's death-penalty scheme does not provide, as required, a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases where it was not." 446 U.S. at 433 (plurality opinion).

The result of Virginia's refusal to narrow its vileness aggravator is just what this Court predicted in *Godfrey* – a system of arbitrary and capricious punishment, which allows juries unbridled discretion to impose the ultimate penalty of death in virtually every case. As a review of Virginia capital

cases shows (Part I *infra*), Virginia juries – unguided by specific and definite instructions – can find vileness in any murder case, regardless of its facts. And the Virginia Supreme Court – applying contradictory and inconsistent standards -- has never once overturned a finding of vileness.

Virginia's refusal to comply with the Constitution and this Court's decisions is extraordinary, particularly when compared to the many states that have responded to this Court's decision in *Godfrey* by narrowing analogous aggravators and providing additional guidance to juries (Part II *infra*). Virginia's refusal to do what other states have done threatens the due process rights of criminal defendants in Virginia and the public's interest in the fair administration of justice (Part III *infra*). Defendants charged with capital murder in Virginia, facing death-qualified juries that are more likely to convict than other juries and total uncertainty as to the factors relevant to their sentencers' determination of "vileness," may consequently forfeit their right to contest their own innocence at trial.

Virginia's death-penalty scheme clearly violates the principles established in *Godfrey* and its progeny. This case presents the issue squarely, and the Petitioner clearly raised the issue at the trial court and in the Virginia Supreme Court (Part IV *infra*). *Amici* request that the Court grant the writ and direct Virginia, at long last, to comply with the Constitution and this Court's decisions. *See* S. Ct. R. 10(c) (review is appropriate where "a state court has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court").

I. BECAUSE THERE ARE NO CLEAR OR OBJECTIVE STANDARDS, VIRGINIA JURIES AND JUDGES CAN FIND "VILENESS" IN ALMOST ANY MURDER CASE, LEADING TO ARBITRARY AND CAPRICIOUS RESULTS.

"[Where] discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. In *Godfrey,* the Court held that an ambiguous instruction to the jury – that it could impose the death penalty if the murder was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery" – was so vague that it would permit the jury to find any murder to be "vile" and thus would result in the arbitrary and capricious imposition of capital sentences. 446 U.S. at 422; *see also Maynard*, 486 U.S. at 363 ("A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'").

To avoid that unconstitutional result, an "aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877. Moreover, "[a] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *see also Maynard*, 486 U.S. at 364.

The vileness aggravator used in Virginia is the same vileness instruction used in Georgia prior to the *Godfrey*

decision. *Compare* Va. Code Ann. § 19.2-264.2 *with* Ga. Code § 27-2534.1(b)(7) (1978). Since *Godfrey*, the Virginia legislature and the Virginia Supreme Court have had numerous opportunities to do what this Court required: to amend the statute or to impose a limiting instruction for juries that would "narrow[] the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 877.

Unlike other states (Part II *infra*), however, neither the judiciary nor the legislature in Virginia has complied with the Court's directive. Rather, Virginia has left its unconstitutionally vague vileness aggravator in place, to be applied by judges and juries across the Commonwealth without clear and objective standards. *See Godfrey*, 446 U.S. at 428. The only "clarifications" that the Virginia Supreme Court has provided sentencers consist of the same inadequate definitions of the terms "aggravated battery" and "depravity of mind" that existed before *Godfrey* was decided. According to the Virginia Supreme Court, an "aggravated battery" is "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder." *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978). "Depravity of mind" is "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.*

Neither of these definitions gives any additional guidance to juries or provides any principled basis for "distinguishing the few cases in which [the penalty] is imposed from the many in which it is not." *Godfrey*, 446 U.S. at 427 (plurality opinion) (internal quotation marks omitted; alteration in original); *see also* Melissa A. Ray, *'Meaningful Guidance': Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 CAP. DEF. J. 85, 89 (2000).

Indeed, they provide no more guidance than the aggravator invalidated in *Maynard,* which merely added the word "especially" to an otherwise unconstitutionally vague instruction. *See* 486 U.S. at 364.

The Virginia Supreme Court has made clear that it has no intention of narrowing these terms further or providing additional guidance to juries. In its view, the aforementioned definitions "are the only constructions rationally related to the commonly accepted connotation of the prefatory words 'outrageously or wantonly vile, horrible or inhuman,'" *Smith*, 248 S.E.2d at 149. Moreover, in blatant disregard of *Godfrey* and its progeny, the Virginia Supreme Court has held that "it is not reversible error for a trial court to refuse to define the statutory terms included in the aggravating circumstances upon which a sentence of death may be based." *Bunch v. Commonwealth*, 304 S.E.2d 271, 285 (Va. 1983); *see also Elliott v. Commonwealth*, 593 S.E.2d 270, 289 n.9 (Va. 2004) (acknowledging that the Virginia Supreme Court has never endorsed any jury instruction limiting the "vileness" aggravator).

As the Court predicted in *Godfrey*, by refusing to provide "specific and detailed guidance," Virginia today maintains a system under which all capital murders potentially meet the vileness standard. *See* Douglas R. Banghart, *A Quarter-Century of Death: A Symposium on Capital Punishment in Virginia Since* Furman v. Georgia, 12 CAP. DEF. J. 77, 79, 89-90 (1999); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C. L. REV. 941, 987-89 (1986). Sentencers in Virginia have virtually unbridled discretion to impose the death penalty in murder cases, and the Virginia Supreme Court has never once overturned a finding of vileness.

As shown by an examination of capital cases decided in Virginia since *Godfrey*, it is impossible to derive any principled boundaries on the Commonwealth's vileness aggravator. The Virginia Supreme Court has given such elastic meaning to "aggravated battery" and "depraved mind" that these categories act effectively as catch-alls, sweeping within their potential scope almost any fact scenario.

For example, one factor used by the Virginia Supreme Court to determine vileness has been the number of bullets fired. The Virginia Supreme Court has repeatedly found that multiple gunshots are sufficient to support a finding of "aggravated battery" and hence vileness justifying the death penalty. *See Green v. Commonwealth*, 580 S.E.2d 834 (2003) (finding that multiple gunshots constituted "aggravated battery"), *cert. denied*, 124 S. Ct. 1448 (2004).

If multiple gunshots constitute "aggravated battery" and therefore establish the vileness predicate, one might assume that a single gunshot killing would not. Yet the Virginia Supreme Court has also determined that crimes involving a single gunshot can be "vile" if the victim sees the bullet coming because this represents psychological torture and therefore shows a "depraved mind." *See, e.g., Poyner v. Commonwealth*, 329 S.E.2d 815, 832 (Va. 1985).

Similarly, the Virginia Supreme Court has found that murders involving suffering by the victim and murders in which the victim dies immediately are both vile. If the victim dies slowly, the suffering caused may constitute an aggravated battery. *See, e.g., Edmonds v. Commonwealth*, 329 S.E.2d 807, 814 (Va. 1985) (finding aggravated battery where defendant left "the victim to suffer an interval of agony awaiting death, evinc[ing] a criminal animus more culpable than that involved in a battery which causes sudden

death."). If the victim dies instantly, however, it has been found the crime involves a "depraved mind," apparently because such killings are "execution-style." *See, e.g., Stewart v. Commonwealth*, 427 S.E.2d 394, 409 (Va. 1993) (finding aggravated battery even though both victims died instantly).

Other examples abound. In Virginia, multiple stab wounds have been held to demonstrate "aggravated battery" sufficient to meet the vileness predicate, *see, e.g., Reid v. Commonwealth*, 506 S.E.2d 787, 792 (Va. 1998) (finding that stabbing the victim many times sufficed for aggravated battery), but so has a single stab wound because it demonstrates killing in a "savage" and "methodical" manner. *See, e.g., Stout v. Commonwealth*, 376 S.E.2d 288, 292 (Va. 1989) (finding one stab wound enough to establish "aggravated battery").

Indeed, the Virginia Supreme Court would likely find the exact facts of the *Godfrey* case sufficient to support the death penalty – despite contrary instruction from this Court. And given the elasticity of Virginia's vileness aggravator, it could do so on any number of different grounds. Under Virginia Supreme Court precedent, the fact that Godfrey killed his victims with a shotgun would be sufficient, without more, to justify the death penalty. *See, e.g., Hudson v. Commonwealth*, 590 S.E.2d 362, 364 (Va. 2004) (upholding vileness finding due to the "maximum damage" the shotgun pellets caused the victims). The *Godfrey* Court, on the other hand, expressly noted that "it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle." 446 U.S. at 433 n.16.

The Virginia Supreme Court also could rely, if it chose, on the fact that Godfrey killed his wife first, then entered the

trailer and killed his mother-in-law. Under Virginia law, the few seconds of anticipation the mother-in-law felt while Godfrey entered the trailer and reloaded his gun could have been "psychological torture" sufficient for a finding of vileness. *See, e.g., Poyner,* 329 S.E.2d at 832 (victim seeing the gun and defendant letting victim see his face established "psychological torture"). But the *Godfrey* plurality did not even discuss this factor and "the trial judge, the prosecutor, and the jury did not believe that the evidence showed that either victim was tortured." 446 U.S. at 434 (Marshall, J., concurring).

Finally, because Godfrey killed his wife in front of his mother-in-law and his eleven-year-old daughter, the Virginia Supreme Court could find such a crime reflecting a "depravity of mind." *See, e.g., Green*, 580 S.E.2d at 848 (finding "depravity of mind" because victim was shot "in front of her husband"). In contrast, this Court found that this circumstance "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey*, 446 U.S. at 433.

Indeed, in a case with facts very similar to *Godfrey*, a defendant was sentenced to death after a jury found the vileness aggravator to apply. The key distinction the Virginia Supreme Court found between that case and *Godfrey* was that the victims were shot from close range, which, in its view, was sufficient to show depravity of mind. *See Stewart*, 427 S.E.2d at 409.

This partial rendition of death-penalty cases in Virginia illustrates what this Court forewarned in *Godfrey* – where there is a lack of clear and objective standards, every murder becomes eligible for the death penalty, and the unbridled discretion given to sentencers leads to arbitrary and capricious results in violation of the Eighth and Fourteenth

Amendments. The Court should grant the writ in this case to address Virginia's refusal to comply with constitutional norms and to invalidate, once again, a death sentence based on the vague vileness aggravator that it found unconstitutional twenty-four years ago.

II. VIRGINIA PRESENTS A STARK CONTRAST TO OTHER STATES WHICH HAVE ALTERED THEIR DEATH-PENALTY REGIMES TO COMPLY WITH THE CONSTITUTIONAL STANDARDS SET FORTH IN *GODFREY*.

The Commonwealth of Virginia stands in stark contrast to other states across the country, which – in response to the Court's series of holdings requiring implementation of "clear and objective" standards for sentencers – have modified their vileness aggravators in an attempt to satisfy the requirements of the Constitution. Indeed, the Petition in this case *understates* the extent to which Virginia is out of step.

As explained in the Petition, jurisdictions in which assessment of the death penalty may be premised on an aggravating factor that incorporates the language found unacceptable in *Godfrey* have – with the sole exception of Virginia – limited the reach of that factor through one means or another. *See* Pet. at 17-19. For example, the New Jersey Supreme Court has undertaken to narrow "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravated assault to the victim." The aggravator is now understood to include only those murders that were not the "product of greed, envy, revenge, or another of those emotions ordinarily associated with murder, and served no purpose for the defendant beyond his pleasure of killing," or in which "the defendant intended to cause, and did in fact cause, severe physical or psychological pain or suffering to the victim prior to the

victim's death." *State v. Ramseur*, 524 A.2d 188, 231 (N.J. 1987). Similarly, under the battery prong of South Dakota's "vileness" factor, that state's highest court has required a "specific intention, design or purpose of maliciously inflicting unnecessary pain" and "infliction of serious physical abuse upon the victim by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." *State v. Moeller*, 548 N.W.2d 465, 490-91 (S.D. 1996); *see also State v. Preston*, 673 S.W.2d 1, 5 (Mo. 1984) (limiting construction of "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman").

In other states with similarly vague aggravators, the courts, citing *Godfrey*, have either invalidated sentencing schemes outright or responded to this Court's direction by imposing a limiting construction. *See, e.g.*, *Jordan v. Watkins*, 681 F.2d 1067, 1082 (5th Cir. 1982) (invalidating "death sentence . . . imposed under guidelines that provided even less guidance to the jury in exercising its sentencing discretion than did those held unconstitutional in *Godfrey*"); *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981) (narrowing a statutory aggravator which assesses how "heinous, atrocious or cruel" was the murder committed by defendant); *State v. Wood*, 648 P.2d 71, 85 (Utah 1982) (holding that consideration of "the ruthlessness and brutality of the murder" – a factor which was "essentially the same" as that on which the faulty death sentence in *Godfrey* had been based – was unconstitutional) (internal quotation marks omitted); *see also Shell v. Mississippi*, 498 U.S. 1, 1 (1990) (*per curiam*) (reversing decision of Mississippi Supreme Court to the extent that it affirmed a death sentence based on the aggravating factor of being "especially heinous, atrocious or cruel," without a constitutionally sufficient limiting instruction).

Although *amici* do not concede that these systems are constitutionally sufficient in all respects, they sharply contrast with Virginia's utter failure to act in response to this Court's rulings. The Commonwealth's anomalous position – not to mention its disregard for well-established Eighth Amendment law and this Court's precedents – demands this Court's attention.

III. VIRGINIA'S DEATH-PENALTY SCHEME SERIOUSLY BURDENS THE RIGHTS OF CAPITAL DEFENDANTS.

Amici, representing counsel for capital defendants across the country and particularly in Virginia, have first-hand knowledge of the practical impact of Virginia's vileness aggravator on the ability of capital defendants to obtain a fair hearing on all issues of guilt and sentencing. As discussed below, Virginia's current death-penalty scheme unfairly influences the strategic choices defendants make in their efforts to avoid the unjust imposition of the death penalty. As such, the unconstitutionally vague vileness aggravator burdens the constitutional rights of defendants and contravenes the public interest in the full and fair adjudication of criminal cases.

First and most fundamentally, as discussed *supra* Part I, the aggravator as currently phrased could be understood to comprehend all cases of murder; thus, it sweeps in even those defendants who should be ineligible for capital punishment under this Court's jurisprudence. Moreover, the vagueness of the vileness aggravator results in widespread sentencing disparities within Virginia, just the sort of arbitrary and capricious result this Court has feared. Indeed, a state-sponsored study has shown that the factor most relevant to the application of the death penalty throughout the Commonwealth is the geographic location of the crime,

demonstrating that the choices of prosecutors and the character of the jury pool – not principled guidance from the statute or courts – determine who gets the death penalty. *See* Joint Legislative Audit and Review Commission of the Virginia General Assembly, Review of Virginia's System of Capital Punishment (2001) at 43 ("The location of the offense has the strongest effect on the probability that a person who commits a capital-eligible offense will face the possibility of the death penalty.").

Second, defendants in Virginia who are not properly eligible for the death penalty under *Godfrey* face juries that are more likely to convict than the average jury panel. Because it is constitutionally permissible for a court to exclude from capital juries those potential jurors who maintain an absolute objection to the death penalty, *see Lockhart v. McCree*, 476 U.S. 162 (1986), and because Virginia state law provides for the use of the same jury in both the guilt and sentencing phases of a capital trial, *see* Va. Code Ann. § 19.2-264.3(C); *Watkins v. Commonwealth*, 331 S.E.2d 422, 431 (Va. 1985), individuals against whom the state plans to seek the death penalty face "death-qualified" juries not only during the sentencing phase of their trials, but at the guilt phase as well. Although facing a death-qualified jury at the guilt phase may not, by itself, violate the Constitution, *see, e.g.*, *Buchanan v. Kentucky*, 483 U.S. 402 (1987), substantial evidence shows that such juries are more likely to convict than non-death qualified juries. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFFALO L. REV. 469, 494 n.109 (1996) (citing studies). Defendants in Virginia should not be so prejudiced because of the Commonwealth's recalcitrance in providing adequate standards for imposition of the death penalty.

Third, the all-encompassing nature of Virginia's vileness aggravator places no manageable limits on evidence admissible at the sentencing phase. Pursuant to Virginia state law, at the sentencing phase of a capital trial, "evidence may be presented as to any matter which the court deems relevant to sentence." Va. Code Ann. § 19.2-264.4. Because any capital murder might be considered "vile" for any number of reasons under Virginia's undifferentiated standard, an overwhelming range of evidence could be deemed relevant to the sentence. Defense counsel in capital cases have no guidance in preparing the substance of their defense during the sentencing phase. Virginia law requires the state to give a defendant notice only of its intention "to introduce . . . evidence of defendant's unadjudicated criminal conduct." *Id.* § 19.2-264.3:2. As the state is under no obligation to inform the defendant of other evidence to be adduced at sentencing, and because almost anything could be relevant to a determination of vileness under Virginia's death-penalty regime, the defense may be critically disadvantaged in its preparation of rebuttal evidence.

Fourth, the wide sweep of the vileness aggravator undoubtedly forces many defendants in Virginia – whether or not they are properly eligible for the death penalty pursuant to *Godfrey* – to forfeit their right to contest their innocence at trial. Defendants may naturally fear going to trial, even where they have a meritorious claim of innocence, because of the threat of an unwarranted death sentence. It can hardly be doubted that the prospect of execution constitutes a major disincentive for a defendant to challenge his guilt, at least where he is able to opt out of the process. *See, e.g.*, *United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002). Moreover, "if the death penalty remains a possibility during trial, a defendant may be forced into trial tactics that

are designed to avoid the death penalty but that have the consequence of making conviction more likely." *Id.*

In each of these ways, Virginia's vague death-penalty scheme undermines not only the full and fair adjudication of criminal matters and contravenes not only defendants' rights but also the public's interest in fair proceedings for all citizens. *See Wade v. Hunter*, 336 U.S. 684, 689 (1949) (recognizing the "public[] interest in fair trials designed to end in just judgments").

IV. THIS CASE PRESENTS A GOOD VEHICLE FOR REVIEW.

Amici agree that Petitioner fully and adequately raised his objections in the courts below. Under Virginia law, "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court." Va. Code Ann. § 8.01-384(A). The Virginia courts have stated in the past that "motions made before, during, and after the trial clearly preserve[] this issue for appeal." *Stuarts Draft Shopping Center, L.P. v. S-D Associates*, 468 S.E.2d 885, 888 n.1 (Va. 1996).

The pretrial motion made by Petitioner and ruled on by the trial court thus preserves the issue for appeal. As the Virginia Supreme Court has noted, "[t]he undeniable purpose of Code § 8.01-384(A) is to relieve counsel of the burden of making repeated further objections to each subsequent action of the trial court that applies or implements a prior ruling to which an objection has already been noted." *King v. Commonwealth*, 570 S.E.2d 863, 866 (Va. 2002). Since the trial court had already ruled on Petitioner's motion regarding the constitutional infirmity of

the vagueness aggravator, no "subsequent action" on his part was required.

The Virginia Supreme Court's new rule requiring repeat objections is novel and also fails to serve any legitimate state purpose. Requiring a defendant to renew, after a mistrial, a pretrial motion that had previously been denied is by no means "a firmly established and regularly followed state practice" that may justify denial of "subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Because the ruling by the Virginia Supreme Court on this issue was, at best, a novel procedural rule, it "cannot bar federal review of constitutional claims that have been plainly and reasonably raised." *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 457 (1958) (holding that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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